Supreme Court, U.S.
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DOCKET No.:

UNITED STATES SUPREME COURT

DARYL D. DAVIS,

Petitioner,

v.

CAROL B. MAGEE,

Respondent.

On Petition for Writ of Certiorari to the Maryland Court of Special Appeals

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the Maryland expungement statute, by requiring the Petitioner to release his causes of action against the Respondent and other county officials as a condition to obtaining expungement of all records related to his unlawful arrest, imprisonment, and prosecution, violates the Due Process Clause of the Fifth Amendment and the Doctrine of Unconstitutional Conditions.

Whether the decision of the Maryland Court of Special Appeals, affirming the summary judgment entered in favor of the Respondent on grounds that the Petitioner had released her from liability, should be vacated because the release was executed pursuant to the unconstitutional Maryland expungement statute.

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REFERENCE TO THE REPORTS OF OPINIONS DELIVERED IN THE CASE

The decision of the Maryland Court of Special Appeals is reported in Davis v. McGee, 140 Md. App. 635, 782 A.2d 351 (2001).

STATEMENT OF JURISDICTION

(i) The Petitioner seeks review of the August 29, 2001 judgment of the Maryland Court of Special Appeals in Davis v. McGee, 140 Md. App. 635, 782 A.2d 351 (2000) which affirmed the summary judgment entered by the Circuit Court of Montgomery County in favor of the Respondent and against the Petitioner.

(ii) The Maryland Court of Appeals denied the Petition for Writ of Certiorari filed prior to the decision of the Court of Special Appeals on November 29, 1999. (356 Md. 634, 741 A.2d 1095 (1999)).

(iii) The Maryland Court of Special Appeals denied the Petitioner's Motion for Reconsideration on November 29, 2001. The Court of Appeals denied the Petition for Writ of Certiorari filed after this denial on February 7, 2002.

(iv) The United States Supreme Court has jurisdiction to review the state court judgment pursuant to 28 U.S.C. § 1257.

(v) The notifications required by Sup. Ct. R. 29 have been made. A copy of this Petition for Writ of Certiorari has been served on the Attorney General for the State of Maryland. Title 28 § 2403(b) may be applicable.

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. V provides:

No person shall be held to answer for a capital, or

otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Md. Code Ann. art. 27 § 735 (now repealed) provided at the time of the trial of this case:

27, § 735. Definitions.

(a) In general. - In this subtitle, the following words have the meanings indicated.

(b) Court records. - (1) "Court records" means all official records maintained by the clerk of a court or other court personnel pertaining to a criminal proceeding including records of violations of the Transportation Article for which a term of imprisonment may be imposed.

(2) "Court records" includes indices, docket entries, charging documents, pleadings, memoranda, transcriptions of proceedings, electronic recordings, orders, judgments, and decrees.

(3) "Court records" does not include:

(i) Records pertaining to nonincarcerable violations of the vehicle laws of the State or of any other traffic law, ordinance, or regulation;

(ii) Written opinions of a court that have been published;

(iii) Cash receipt and disbursement records necessary for audit purposes; or

(iv) A court reporter's transcript of proceedings in multiple

defendant cases.

(c) Expungement. - "Expungement", with respect to court records or police records, means the effective removal of these records from public inspection:

(1) By obliteration;

(2) By removal to a separate secure area to which the public and others having no legitimate reason for being there are denied access; or

(3) If effective access to a record can be obtained only by reference to other records, by the expungement of the other records, or the part of them providing the access.

(d) Law enforcement agency. - "Law enforcement agency" includes any State, county, and municipal police department or agency, sheriff's offices, the State's Attorney's offices, and the Attorney General's office.

(e) Police records. - (1) "Police records" means all official records maintained by a law enforcement agency, a booking facility, or the Central Repository pertaining to the arrest and detention of or further proceeding against an individual for:

(i) A criminal charge;

(ii) A suspected violation of a criminal law; or

(iii) A violation of the Transportation Article for which a term of imprisonment may be imposed.

(2) "Police records" does not include:

(i) Investigatory files;

(ii) Police work-product records used solely for police investigation purposes; or

(iii) Records pertaining to nonincarcerable violations of the vehicle laws of the State or of any other traffic law, ordinance,

or regulation.

(f) Crime of violence. - "Crime of violence" has the meaning stated in § 643B (a) of this article.

(g) Central Repository. - "Central Repository" means the Criminal Justice Information System Central Repository of the Department of Public Safety and Correctional Services.

Md. Code Ann. art. 27 § 737 (now repealed) provided at the time of the trial of this case:

27, § 737. Right to petition for expungement of police, court records; conditions and limitations; times of filing.

(a) Petition for expungement generally. - A person charged with the commission of a crime, including a violation of the Transportation Article for which a term of imprisonment may be imposed, may file a petition setting forth the relevant facts and requesting expungement of the police records, court records, and other records maintained by the State of Maryland and its subdivisions, pertaining to the charge if:

(1) The person is acquitted;

(2) The charge is otherwise dismissed or quashed;

(3) Except if charged with a violation of § 21-902 TRANSP. of the Transportation Article, a judgment of probation before judgment is entered;

(4) A nolle prosequi is entered;

(5) The proceeding is placed on the stet docket;

(6) The case is compromised pursuant to § 766 of this article;

(7) The person is convicted of only one criminal act, which is not a crime of violence, and is subsequently granted a full and unconditional pardon by the Governor; or

(8) The charge was transferred to juvenile court jurisdiction

under § 594A of this article.

(b) Petition for expungement of a criminal charge transferred to juvenile court. - (1) If a criminal charge was transferred to the juvenile court under § 594A of this article, a court shall grant a petition for expungement if:

(i) The charge transferred under § 594A of this article did not result in the filing of a petition under § 3-810 CTS. & JUD. PROC. of the Courts and Judicial Proceedings Article; or

(ii) The charge did result in the filing of a petition under § 3-810 CTS. & JUD. PROC. of the Courts and Judicial Proceedings Article but the decision on the petition was a finding of facts-not-sustained.

(2) (i) A petition for expungement of a criminal charge transferred to the juvenile court under § 594A of this article may be filed at any time after:

1. If a petition is not filed under § 3-810 CTS. & JUD. PROC. of the Courts Article, the date of the decision not to file a petition; or

2. If a petition is filed under § 3-810 CTS. & JUD. PROC. of the Courts Article, the decision on a petition of facts-not-sustained.

(ii) If a charge transferred under § 594A of this article resulted in the filing of a petition under § 3-810 CTS. & JUD. PROC. of the Courts and Judicial Proceedings Article and the adjudication of the child as delinquent, the court may grant a petition for expungement on or after the 21st birthday of the petitioner.

(c) Where petition filed. - The petition shall be filed in the court in which the proceeding was commenced. If the proceeding was commenced in one court and transferred to another court, the petition shall be filed in the court to which the proceeding was transferred. If the proceeding in a court of original jurisdiction was appealed to a court exercising

appellate jurisdiction, the petition shall be filed in the appellate court. However, the appellate court may remand the matter to the court of original jurisdiction.

(d) Time of filing when case resulted in acquittal, nolle prosequi or dismissal. - (1) Except as provided in paragraph (2) of this subsection, a petition for expungement based on the following dispositions may not be filed earlier than 3 years after the date of the disposition:

(i) An acquittal;

(ii) A nolle prosequi; or

(iii) A dismissal or quashing of a charge.

(2) A petition for expungement based on the dispositions described in paragraph (1) of this subsection may be filed earlier than 3 years after the date of the disposition if the person files with the petition a written general waiver and release, in proper legal form, of all claims the person may have against any person for tortious conduct arising from the charge.

(e) Time of filing when case resulted in probation. - A petition for expungement based on a probation before judgment may not be filed earlier than the later of:

(1) 3 years after the date of the entry of judgment or order of probation; or

(2) The date of the person's discharge from probation.

(f) Time of filing when case resulted in pardon. - A petition for expungement based on a full and unconditional pardon by the Governor for a conviction for only one criminal act which is not a crime of violence may not be filed earlier than 5 years nor later than 10 years after the pardon was signed by the Governor.

(g) Time of filing when case resulted in stet or compromise. -

A petition for expungement based on the entry of a stet or a compromise under § 12A-5 of this article may not be filed earlier than 3 years after the judgment or order was entered.

(h) Granting of petition for good cause. - Notwithstanding any other provision of this section, a court may grant a petition for expungement at any time on a showing of good cause by the petitioner.

(i) Service on State's Attorney; objection requirements. - A copy of the petition shall be served on the State's Attorney. Unless the State's Attorney files an objection to the petition within 30 days after it is served on him, the court shall enter an order requiring the expungement of police records and court records pertaining to the charge.

(j) Hearing by court; granting or denial of expungement. - If the State's Attorney files a timely objection to the petition, the court shall conduct a hearing. If the court finds that the person is entitled to expungement, it shall enter an order requiring the expungement of police records and all court records pertaining to the charge. Otherwise, it shall deny the petition. If the petition is based upon the entry of a judgment of probation before judgment, a nolle prosequi, placement on the stet docket, or a full and unconditional pardon by the Governor, the person is not entitled to expungement if:

(1) He has since been convicted of any crime, other than violations of the State vehicle laws or other traffic laws, ordinances, or regulations not carrying a possible sentence of imprisonment; or

(2) He is then a defendant in a pending criminal proceeding.

(k) Appellate review. - The State's Attorney is a party to the proceeding. Any party aggrieved by the decision of the court has the right of appellate review provided in the Courts and Judicial Proceedings Article.

(l) Notice of compliance. - Every custodian of the police

records and court records subject to the order shall, within 60 days after entry of the order, unless it is stayed pending an appeal, advise the court and the person in writing of compliance with the order.

STATEMENT OF THE CASE

In early 1997 Respondent Carol B. Magee, a police officer of the Montgomery County Police Department assigned to the Youth Services Investigative Division, began an investigation of allegations by a 15 year old girl that she had engaged in sexual intercourse with Petitioner Daryl D. Davis, an adult African-American male. The girl's claim that she had engaged in sexual relations with Mr. Davis was false. Mr. Davis had not engaged in sexual relations with the girl as she alleged or otherwise and had never had any contact of a sexual nature with her.

Despite the absence of evidence that would have provided probable cause for an arrest, Officer Magee on March 18, 1997 applied for and obtained an arrest warrant accusing Mr. Davis of unlawfully committing a sexual offense in the third degree upon the child. (App. at 51a, 52a). On March 26, 1997 Officer Magee arrested Mr. Davis based on this warrant. Following the arrest, Mr. Davis was imprisoned in a jail cell for 30 hours. Thereafter he was released pending trial. On June 27, 1997 the district attorney entered a nolle prosequi discharging Mr. Davis from all criminal responsibility in connection with the charges. (App. 56a).

Desiring to restore his reputation insofar as possible by having the records pertaining to the false charges removed from public view, Mr. Davis decided to seek a court order requiring the expungement of all records pertaining to the arrest, imprisonment, and prosecution. Md. Code Ann. art. 27 § 737(a) at that time permitted a citizen against whom charges had been brought but subsequently nol prossed to obtain expungement "of the police records, court records, and other records maintained by the State of Maryland and its subdivisions, pertaining to the charge....." In order to obtain expungement of these records prior to three years from the date of disposition, however, the statute also required the citizen to file "with the petition a written general waiver and release, in proper legal form, of all claims the

person may have against any person for tortious conduct arising from the charge." Md. Code Ann. art. 27 § 737(d)(2). Md. R. Civ. Pro. 4-504(b) likewise required a General Waiver and Release to be filed with the expungement petition "when required by law" and contained a form to be used for this purpose.

Mr. Davis obtained pre-printed forms from county officials for both the expungement petition and the statutorily-required release. He filled out the forms and on June 27, 1997 filed both a Petition for Expungement of Records (App. at 58a) and a General Waiver and Release. In this latter document, he agreed to release Officer Magee and other county employees from all claims arising from his arrest, detention, or confinement. The release provided, however, that it was conditioned on the expungement of "the record of my arrest, detention, or confinement and compliance with Section 736(c) of Article 27 of the Annotated Code of Maryland:"

> I, Daryl Dwight Davis, hereby release and forever discharge Det. Carol Magee and the Montgomery County Police Department, all of its officers, agents, and employees and any and all other persons from any and all claims which I may have for wrongful conduct by reason of my arrest, detention, or confinement on or about March 26, 1997.
>
> This General Waiver and Release is conditioned on the expungement of the record of my arrest, detention, or confinement and compliance with Section 736(c) of Article 27 of the Annotated Code of Maryland, and shall be void if these conditions are not met.

(App. at 60a). [1] The District Court thereafter "granted the appellant's petition and entered an expungement order." Davis v. McGee, 140 Md. App. 635, 641, 782 A.2d 351 (2000).

Despite this order, the Montgomery County Department of Health and Human Services (DHHS) , by letter dated October 29, 1997 notified Mr. Davis that it had conducted an investigation of the allegations in which he had been identified as a child abuser. The letter further advised Mr. Davis that DHHS had decided that Mr. Davis would remain "indicated" as a child abuser and that his identification as a child abuser would not be expunged from the records. (App. at 61a). Mr. Davis subsequently learned that the Department of Social Services also continued to list his name on its Central Registry of Child Sexual Abusers as an "indicated" child abuser.

By letter dated June 30, 1997 Mr. Davis complained about his arrest by Officer Magee to Montgomery County Police Chief Carol A. Mehrling. She assigned the letter to the Office of Internal Affairs (OIA) for review. OIA Lieutenant Frank Young began a review of the case file. By letter dated July 24, 1997 Chief Mehrling advised Mr. Davis that no administrative violations in connection with his arrest had been identified. Mr. Davis subsequently sent three additional letters to Chief Mehrling complaining about the handling of the incident by the police.

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[1] Md. Code Ann. art. 27 § 736 governed the right of expungement where a person had been arrested, detained, or confined and then released without being charged with a crime. This statute had no application to the expungement sought by Mr. Davis since he had in fact been charged with committing a third degree sexual offense. The form given to Mr. Davis by county officials nonetheless references § 736(c). Subsection (c) provided that, where expungement was sought under this statute, law enforcement officials were required to make a "diligent search for any police records concerning that arrest, detention, or confinement of the individual...."

In March of 1998 the Montgomery County Council scheduled a public hearing to address complaints of racism by members of the Montgomery County Police Department. Lt. Young prepared an OIA Case Update dated March 9, 1998 which summarized the police investigation of the complaint filed by Mr. Davis and noted that the OIA had concluded that the claim was unfounded. Lt. Young also prepared a memorandum that contained the following description of the incident:

> A female investigator in my division conducted an investigation of a suspected child abuse and sexual offenses. She identified a number of individuals involved in this incident, and ultimately arrested three people, including the person who make the complaint to the police department and the NAACP.
>
> This person sent a letter to Chief Mehrling and alleged that he was unjustly arrested. The complaint was sent to my office for review. It was reviewed by Sergeant Cage and myself and it was determined that the investigator had more than sufficient probable cause to apply for and obtain a warrant charging this individual with a felony sex offense. The charges were nol-prossed by the State's Attorney's Office because it was felt the victim would be unable to stand the rigors of a trial.

(App. at 65a-68a). Lt. Young submitted these documents - as well as copies of the letters Mr. Davis had sent to the police - to the Council for disclosure to the public.

On March 10, 1998 Mr. Davis attended the hearing. At this meeting, Mr. Davis was shocked to see that the Police Department had submitted to the County Council the OIA Update, the memorandum prepared by Lt. Young, and copies of his letters to the police. Although the names of the

police officers charged had been redacted in the letters, the Petitioner's name was not redacted or concealed in any manner. Consequently, any member of the public by reviewing these records would learn the full story of the incident. Mr. Davis accordingly realized that the police as well as the county agencies continued to keep records of the false charges and his unlawful arrest and confinement notwithstanding the expungement order.

On March 9, 1998 Mr. Davis filed suit against Officer Magee, Montgomery County, the Montgomery County Police Department, and Police Chief Carol Mehrling asserting various causes of action arising out of the arrest, imprisonment, and prosecution. He decided to eliminate all Defendants except for Officer Magee and accordingly filed an Amended Complaint naming only Officer Magee as a Defendant on May 6, 1998. This pleading asserted state law causes of action for false arrest, false imprisonment, and malicious prosecution.

Officer Magee filed a Motion to Dismiss the Amended Complaint on grounds, inter alia, that Mr. Davis hadreleased her from liability when he executed the General Waiver and Release. In opposing this motion, Mr. Davis on July 20, 1998 filed a Supplemental Opposition to Motion to Dismiss the Amended Complaint. (App. at 69a). This brief contended, inter alia, that the General Waiver and Release was void because the Maryland expungement statute and Md. R. Civ. Pro. 4-504 violated his "federal ...constitutional right to have his claims adjudicated by due process of law" and the Doctrine of Unconstitutional Conditions. (App. at 76a, 77a). In this regard, he argued that the statute and court rule unconstitutionally conditioned the right to obtain expungement on the waiver of due process rights including the right to access to the courts.

On October 26, 1998 Mr. Davis filed a Second Amended Complaint. Officer Magee again moved for summary judgment on grounds, inter alia, that Mr. Davis had

released her from liability. On March 16, 1999 Mr. Davis filed an opposition to this motion which again contended that "requiring a citizen to release his claims as a condition to having records of a false arrest and charge expunged is unconstitutional." (App. at 76a). He attached his July 20, 1998 brief as an exhibit and explained that this brief set forth the legal basis for the constitutional challenge. (App. at 76a).

The Circuit Court granted the summary judgment motion on grounds that Mr. Davis by executing the General Waiver and Release had released all claims against Officer Magee arising out of the arrest:

> I am going to decide the case on the basis of the release...I find that there is no material dispute of fact as to whether or not there was a release in the case signed by the plaintiff, and that the release bars his claim under the second amended complaint.

(App. at 12a). The Circuit Court made no express ruling on the Petitioner's claim that the expungement statute and court rule were unconstitutional but by enforcing the release obviously rejected this contention.

Mr. Davis timely filed a Notice of Appeal of this judgment to the Maryland Court of Special Appeals. In his brief, he argued that the release was unenforceable, inter alia, because the expungement statute and court rule violated his federal constitutional right to due process of law:

> Mr. Davis alternatively submits that the summary judgment must be reversed because the expungement statute is unconstitutional to the extent that it requires a citizen to release his claims as a condition to having court and police records expunged. By requiring a plaintiff seeking the expungement of police and court records concerning an unlawful arrest and imprisonment to release all claims arising

> out of the false arrest and imprisonment, Md. Code Ann. art. 27 § 736(b) imposes unconstitutional conditions on the statutory right of expungement. The release accomplishes indirectly what the State could not do directly - viz., it bars a plaintiff injured by police misconduct from access to the courts and prevents the plaintiff from receiving due process of law. Consequently, regardless of whether Mr. Davis has a contract right to rescind the release, the release is unenforceable as a matter of law because it was executed by command of an unconstitutional statute. The United States Supreme Court has long recognized that a state may not condition the receipt of a government benefit on the waiver of a constitutional right. Dolan v. City of Tigard, 512 U.S. 389, 394 (1994)("[u]nder the well settled doctrine of 'unconstitutional conditions, the government may not require a person to give up a constitutional right...in exchange for a discretionary benefit where the property sought has little or no relationship to the benefit"); Perry v. Sindermann, 408 U.S. 593, 597 (1972)(the government may not deny a person a benefit "on a basis that infringes his constitutionally protected interests").

(Appellant's Brief @ last page. App. at 78a-83a)

In an opinion filed August 29, 2001, the Court of Special Appeals in Davis v. McGee, 140 Md. App. 635, 782 A.2d 351 (2001) affirmed the summary judgment entered in favor of the Respondent. Relying on Newton v. Rumery, 480 U.S. 386 (1986), the Court of Special Appeals rejected the federal constitutional challenge. The court explained that the reason the statute conditioned expungement on the release was because "without such a release, potential defendants could be placed in the position of having to defend them-

selves against claim when the records they would need to do so had been destroyed or made inaccessible at the plaintiff's request." The court accordingly concluded that the statute "is rationally based and not unconstitutional":

> The appellant also contends that the circuit court erred in granting summary judgment in favor of Magee because the Maryland expungement statutes are unconstitutional, in that they imposed upon him an obligation to forfeit his constitutional right to sue the State as a condition to obtaining expungement of his records. He argues that a State may not condition the receipt of a government benefit on the waiver of a constitutional right....
>
> In this case, the appellant made a voluntary and rational decision, with the advice of counsel, to release his potential tort claims in exchange for obtaining immediate expungement of records. "The criminal process, like the rest of the legal system, is replete with situations requiring `the making of difficult judgments' as to which course to follow." McMann v. Richardson, 397 U.S. 759, 769 (1970). Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." Newton, 480 U.S. 386, 393-94; Crampton v. Ohio, decided with McGautha v. California, 402 U.S. 183, 213 (1971). The requirement in § 737 that a defendant charged with a crime release potential related tort claims if the charge is nol prossed and he seeks to expunge the records pertaining to it before limitations would expire on the potential claims is rationally based and not unconstitutional.

Davis v. McGee 140 Md. App. at 657-58. The Court of Special Appeals subsequently denied the Petitioner's Motion for Reconsideration of this opinion. (App. at 48a).

The Petitioner thereafter filed a Petition for Writ of Certiorari with the Court of Appeals. In this Petition, the Petitioner again raised the argument that the expungement statute violated his right to due process of law and the Doctrine of Unconstitutional Conditions. On February 7, 2002 the Court of Appeals denied the petition. (App. at 50a).

ARGUMENT

I. BECAUSE THE MARYLAND EXPUNGEMENT STATUTE VIOLATES THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW AND THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

A. The Maryland expungement statute violates the Due Process Clause and the Doctrine of Unconstitutional Conditions because no essential nexus exists between any legitimate state interest and the condition imposed and because the degree of the exactions demanded by the condition is not roughly proportional to the benefit conferred

At the outset, it must be remembered that the Petitioner as a matter of law must be presumed innocent of all charges filed against him by the State of Maryland. The state entered a nolle prosequi on the charge of child sexual abuse and elected not to try him. The Petitioner, a man of high integrity and stature in the community, had a compelling need and desire to immediately clear his reputation of this horrible charge and have all records of the false accusation expunged from public view. He sought expungement pursuant to Md. Code Ann. art. 27 § 737 "of the police records, court records, and other records maintained by the State of Maryland and its subdivisions, pertaining to the charge...."Because Mr. Davis sought expungement earlier than three years after the nolle prosequi, however, the statute conditioned expungement on his execution of a release discharging all persons from liability:

> (d) Time of filing when case resulted in acquittal, nolle prosequi or dismissal. - (1) Except as provided in paragraph (2) of this subsection, a petition for expungement based on the following dispositions may not be filed earlier than 3 years after the date of the disposition:
>
> ...

(ii) A nolle prosequi;

...

(2) A petition for expungement based on the dispositions described in paragraph (1) of this subsection may be filed earlier than 3 years after the date of the disposition if the person files with the petition a written general waiver and release, in proper legal form, of all claims the person may have against any person for tortious conduct arising from the charge.

Md. Code Ann. art. 27 § 737(d)(1) & (2)(emphasis added)(repealed). [2]

Mr. Davis obtained an expungement order under this statute. When he learned that the police and county agencies continued to keep records of the false charges despite the expungement order, he concluded that the condition precedent to enforcement of the release had not been satisfied and that he was entitled to sue. He filed suit against Officer Magee who in turn raised the release as a defense. At every step of the proceedings in the trial court and the appellate courts, the Petitioner argued not only that the release was unenforceable as a matter of contract law but also that it was unenforceable because the expungement statute itself was unconstitutional.

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[2] Md. Crim. Pro. Code Ann. § 10-105 now governs the expungement of records following the entry of a nolle prosequi. Md. Crim. Pro. Code Ann. § 10-105(c) retains § 737's requirement that a petition for expungement based on a nolle prosequi "may not be filed within 3 years after the disposition, unless the petitioner files with the petition a written general waiver and release of all the petitioner's tort claims arising from the charge."

The Fifth Amendment to the United States Constitution, applicable to the states by the Fourteenth Amendment, guarantees that citizens will receive due process of law. U.S. Const. amend V. Due process requires that citizens be given the right of access to the courts to seek remedies for injuries caused to them by state employees. Pursuant to these provisions, the Petitioner had a constitutional right to due process of law with respect to the maintenance of his claims against Officer Magee. The question presented by this Petition for Writ of Certiorari is whether the State of Maryland under the circumstances of this case may condition an innocent citizen's right to expungement on the waiver of this constitutional right.

Applying the Doctrine of Unconstitutional Conditions, the United States Supreme Court has long recognized that a state may not condition the receipt of a government benefit on the waiver of a constitutional right:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Speiser v. Randall, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible.

Perry v. Sindermann, 408 U.S. 593, 597 (1972). In Dolan v. City of Tigard, 512 U.S. 374 (1994), for example, the petitioner applied for a building permit from the city. The city advised her that she could have the building permit only if she dedicated a portion of her property to the city for flood control purposes. The petitioner brought suit alleging that this condition effectively required her to give the city a portion of her land without receiving just compensation as guaranteed by the Takings Clause of the Fifth Amendment.

The Court agreed. The Court explained that:

> Under the well settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right - here the right to receive just compensation when property is taken for a public use - in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.

512 U.S. at 385. In evaluating a challenge to a government imposed condition under this doctrine, it must first be determined whether an "essential nexus" exists between a legitimate state interest and the condition. If such a nexus exists, it must then be decided whether the degree of the exactions demanded by the condition bears the required relationship to the benefit conferred. In this regard, the Court applies the "rough proportionality" test. Although "[n]o precise mathematical calculation is required," the waiver demanded must be related both in nature and extent to the benefit conferred on county officials. Id. at 386.

Although the Court in Dolan applied this principal in the context of the Takings Clause of the Fifth Amendment, the principal is applicable by analogy to the waiver of other constitutional rights including the Due Process Clause. The cause of action itself is a property interest for Fifth Amendment purposes. By requiring Mr. Davis to release his

claims as a condition to obtaining expungement of the police, court, and agency records, the Maryland expungement statute effectively deprives Mr. Davis of this property interest and forces him to waive his constitutional rights. The Petitioner submits that the State of Maryland may not constitutionally impose this condition unless the statute (and court rule imposing the same requirement) satisfies the test set forth in Dolan.

Md. Code Ann. art. 27 § 737(d)(1) & (2) clearly fails this test as applied to the instant case. According to the Court of Special Appeals, the rationale for the release requirement of the expungement statute "is that without such a release, potential defendants could be placed in the position of having to defend themselves against claims when the records they would need to do so had been destroyed or made inaccessible at the plaintiff's request." 140 Md. App. at 657. This rationale has no application whatsoever to the instant case. All of the state law claims asserted against Officer Magee turned on whether she had probable cause to arrest, imprison, and prosecute Mr. Davis. Viewing the evidence in the light most favorable to Mr. Davis - as the state courts were required to do in considering Officer Magee's summary judgment motion - none of the records expunged would have prejudiced Officer Magee's defense to these claims. First, with respect to the court records, the claims against Mr. Davis were nolle prossed about three months after the arrest. There accordingly were very few court records in the file of this case. And there are no court records that provide any defense to Officer Magee with respect to the claims asserted. Second, with respect to the police records, the expungement statute did not require expungement of police investigatory files. Md. Code Ann. art. 27 § 735(e)(2)("'Police records' does not include... Investigatory files"). Consequently, the records pertaining to the investigation that Officer Magee conducted that led her to conclude that she had probable cause to arrest Mr. Davis were always available to her. In other words, for summary judgment purposes at least, the records she would need to defend herself were always available.

That other state agencies had independently concluded that Mr. Davis was in fact an indicated child abuser based on their investigation did not provide any defense to Officer Magee since, as far as the record shows, Officer Magee did not consider or otherwise have knowledge of the agency investigations. In fact, her application for a search warrant indicates that she based the charges solely on her interviews with the child and other purported witnesses. On summary judgment, of course, Mr. Davis was entitled for the state courts to make these reasonable inferences. Similarly, that Lt. Young subsequent to the arrest, imprisonment, and prosecution had created and kept records of Mr. Davis' complaint against Officer Magee would have no bearing on whether Officer Magee had probable cause to institute the arrest and prosecution.

As applied to this case, there accordingly is no "essential nexus" at all between the legitimate state interest (assuring that police officers will have the records they need to defend themselves) and the condition (requiring Mr. Davis to waive his right to sue in order to have the records expunged). Assuming arguendo, however, that some remote nexus exists, the degree of the exactions demanded (the total waiver of the right to sue) is not even "roughly proportional" to the benefit conferred on Officer Magee. The records she would need to defend herself would be available in the investigatory files regardless of whether all of the records required to be expunged by the expungement statute were in fact eliminated.

The expungement statute's release of "all claims" requirement is also a "poor fit" compared to the purported justification that police officers need the records for their defense. This goal could be accomplished by means far less burdensome than the compelled waiver of an innocent citizen's right to access to the courts and to due process. For example, in cases where the investigatory files did not provide the records needed for a defense, expungement could be conditioned on agreement by the plaintiff for the officer to

have access to the records for purpose of her defense instead of conditioning expungement on a waiver of claims.

The Petitioner accordingly submits that the Court should rule that the expungement statute is unconstitutional to the extent that it required him to execute the General Waiver and Release as a condition to obtaining expungement of the records at issue. The summary judgment in favor of Officer Magee therefore should be reversed, the Court should rule that the release is void as a matter of law, and the case should be remanded for trial.

B. Newton v. Rumery, 480 U.S. 386 (1986), the case relied upon by the Court of Special Appeals, has no application to the issue of whether the Maryland expungement statute violates the Petitioner's right to due process of law

Newton v. Rumery, 480 U.S. 386 (1986), the case relied upon by the Court of Special Appeals in concluding that the Maryland expungement statute is not unconstitutional, has almost nothing to do with the Petitioner's due process challenge to the expungement statute. Newton did not involve a due process challenge at all; nor did it consider whether a state law may condition expungement on the release of claims against government officials; nor did Newton involve a challenge to a statute or court rule at all. Newton addressed solely a challenge brought under 42 U.S.C. § 1983 to an agreement pursuant to which state officials agreed not to prosecute Rumery in return for his agreement to release them from liability. The sole issue raised by Rumery and the sole issue addressed by the Court in this case was whether such agreements are per se invalid as being contrary to public policy and whether the district court erred in enforcing the agreement executed with Rumery. The Court concluded that such agreements are not per se invalid as being contrary to public policy and that the particular agreement signed by Rumery likewise did not offend public policy. The Court never considered whether the agreement violated Rumery's right to due process or the Doctrine of Unconstitutional

Conditions. Indeed, the Court expressly stated that "[t]he relevant principle is well established: a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." 480 U.S. at 389.

In this case, the Petitioner did not claim that the General Waiver and Release was unenforceable because it offended public policy. He made a direct constitutional attack on the statute and court rule which required county officials to condition expungement on the release. The decision in Newton accordingly has no application to whether, as the Petitioner argued, the expungement statute is unconstitutional.

C. The Petition for Writ of Certiorari should be granted pursuant to Sup. Ct. R. 10

Sup. Ct. R. 10 provides that a writ of certiorari may be granted where " a state court ... has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." The Maryland Court of Special Appeals has ruled that the Maryland expungement statute does not violate the Due Process Clause and the Doctrine of Unconstitutional Conditions. This Court has never addressed this precise question. To the extent that the Court in Dolan and in other decisions has set forth the test for applying the Doctrine of Unconstitutional Conditions, the decision of the Court of Special Appeals conflicts with these decisions.

There are substantial public interests at stake in resolving this question. Unless the expungement statute is declared unconstitutional, the State of Maryland will continue to require innocent citizens to waive their causes of action against state and county employees as a condition to obtaining expungement of the records of their arrest, imprisonment, and prosecution. The Court accordingly should grant this Petition and direct the parties to file briefs addressing this issue

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

DAVID E. KINDERMANN, ESQ.
Attorney for Petitioner
105 South Washington St.
Rockville, Md. 20850
(301) 762-7900

APPENDIX

STATE OF MARYLAND, MONTGOMERY COUNTY,
TO WIT:

I HEREBY CERTIFY that the foregoing are the original papers in the case of Daryl D. Davis vs. Carol B. Magee et al., being Civil No. 183777 as identified in the attached Index and copy of Docket Entries.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the Seal of the Circuit Court for Montgomery County, Maryland This 22nd day of July, AD., 1999

Molly Q. Ruhl
Clerk of the Circuit Court for
Montgomery County, Maryland

Cost of Record: $ 50.00
Cost of Testimony: $107.58

Civil INFORMATION FOR CASE #183777
AS OF 07/15/99 14:44 172

TRIAL ELECTION : JURY Status: INACTIVE
as of: 04/13/1999

TRACK: 4 CALENDAR: 6

P DARYL D DAVIS
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11/11/1111
ELBERT R SHORE
110 SOUTH WASHINGTON ST.
ROCKVILLE, MD 20850
PHONE# (301) 762-7979
1117

-VS.

D
CAROL B. MAGEE 11/06/1998
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CHARGES

#01 FALSE IMPRISONMENT
#02 FALSE ARREST
#03 MALICIOUS PROSECUTION
#04 VIOLATION OF RIGHTS

COSTS:

FILING $80.00 , 03/09/1998,
ASSESSED STATUS DATE
03/09/1998
PAID STATUS: PAID

CLERKS: $60.00, 04/13/1999
ASSESSED STATUS DATE
04/13/1999
PAID STATUS: PAID

APPEALS: $50.00 04/13/1999
ASSESSED STATUS DATE
04/13/1999
PAID STATUS: PAID

DATE	SCHEDULED EVENT
06/12/1998	SCHEDULING CONFERENCE
09/03/1998	DISMISS AMENDED COMPLAINT
11/05/1998	MOTION TO DISMISS
04/05/1999	COMPEL
04/05/1999	PM-49 DISMISS, #45
04/05/1999	COMPEL DISMISS

CIVIL INFORMATION FOR CASE#183777
AS OF 07/22/

DARYL D DAVIS VS. CAROL B MAGEE

DOCKET INFORMATION CONT' D.

04/05/1999 #58
HEARING ON DEFENDANT CAROL MAGEE'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT
(#49) (DONOHUE, J.)
GRANTED AS TO SUMMARY JUDGMENT.

JUDGE: D. DONOHUE
TYPE: RULING STATUS: GRANTED

04/05/1999 #59
JUDGMENT ENTERED IN FAVOR OF THE DEFENDANT CAROL MAGEE, DENYING ALL PLAINTIFF'S RELIEF.

04/06/1999 #60
PLAINTIFF'S NOTICE OF SERVICE OF DISCOVERY FILED.

04/09/1999 #61
NOTICE OF ENTRY OF JUDGMENT MAILED.

04/13/1999 #62
PLAINTIFF'S NOTICE OF APPEAL, FILED.

05/27/1999 #63
ORDER OF COURT OF SPECIAL APPEALS (EYLER J.) DIRECTING
THE APPEAL TO PROCEED WITHOUT A PREHEARING CONFERENCE ENTERED. JUDGE: J EYLER

07/22/1999 #64
TRANSCRIPT OF PROCEEDINGS ON APRIL 5, 1999 FILED.

07/22/1999 #65
RECORD MAILED TO COURT OF SPECIAL APPEALS.

END OF INFORMATION FOR CASE #183777

Civil INFORMATION FOR CASE #183777
AS OF 07/15/99 14:44 172 CONTINUED

DARYL D. DAVIS VS. CAROL B. MAGEE

DOCKET INFORMATION

CASE#: 183777 CASE TYPE:
Civil Reference Case: (none)

03/09/1998 #1
COMPLAINT AND JURY DEMAND FILED.

03/09/1998 #2
PLAINTIFF'S INFORMATION SHEET FILED.

03/10/1998 #3
NOTICE OF SCHEDULING CONFERENCE AND ORDER OF COURT-TRACK III
(WEINSTEIN, J.) FILED. (COPIES MAILED)

03/10/1998 #4
FIVE (30 DAYS)
PLAINTIFF.
SUMMONSES ISSUED FOR PERSONAL SERVICE AND MAILED TO THE

03/24/1998 #5
AFFIDAVIT OF SERVICE BY MAILING AS TO CAROL B. MAGEE, CAROL A. MEHRLING, MONTGOMERY COUNTY POLICE DEPARTMENT, DOUGLAS M. DUNCAN AND MONTGOMERY COUNTY AND RETURN RECEIPTS' FILED. TYPE: DOCKET

04/09/1998 #6
DEFENDANTS' MOTION TO DISMISS, REQUEST FOR HEARING, MEMORANDUM OF GROUNDS AND AUTHORITIES IN SUPPORT AND ATTACHMENT FILED.

04/09/1998 #7
DEFENDANTS' INFORMATION SHEET FILED.

04/21/1998 #8
PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS, AND REQUEST FOR HEARING FILED.

04/28/1998 #9
NOTICE OF HEARING DATE FILED AND MAILED.
(HEARING DATE: 06/02/1998)

05/06/1998 #10
PLAINTIFF'S AMENDED COMPLAINT AGAINST DEFENDANT CAROL B. MAGEE FILED.

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

DARYL D. DAVIS,

Plaintiff,

V. Civil No. 183777

CAROL B. MAGEE, ET AL,

Defendants.

HEARING

Rockville, Maryland April 5, 1999

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

DARYL D. DAVIS,

Plaintiff,

V. Civil No. 183777

CAROL, B. MAGEE, ET AL,

Defendants.

Rockville, Maryland
April 5, 1999

WHEREUPON, the proceedings in the above-entitled matter commenced

BEFORE: THE HONORABLE D. WARREN DONOHUE, Judge

APPEARANCES:
FOR THE PLAINTIFF:

ELBERT R. SHORE, Esq.
110 South Washington St.
Rockville, MD 20850

FOR THE DEFENDANT:

BRIAN G. KIM, Esq.
Associate County Attorney

things are being said with respect to the State's Attorney's actions in his absence, and I would request that the Court disregard those kinds of statements, and at least, if this case goes forward, then the State's Attorney ought to have an option to defend his actions in the underlying case.

THE COURT: Okay. Well, I do not need to hear anything else from you.

MR. KIM: Very well.

THE COURT: Because I am going to decide the case on the basis of the release. What is before me is a motion for summary judgment. I treat it as a motion for summary judgment, not as a motion to dismiss, and one of the reasons I denied it earlier was because I felt like it could not be a motion to dismiss.

It had to be a motion for summary judgment since it raised, in effect, an affirmative defense of a release. I find that there is no material, dispute of fact as to whether or not there was a release in the case signed by the plaintiff, and that the release bars his claim under his second amended complaint.

The plaintiff argues that that should not be so because it is a conditional release, and the conditions have not been met, or at least there is a dispute of fact as to whether the conditions have not been met.
The Court finds that the conditions have been met,

that the argument that DSS and Internal Affairs and a memo from Detective Young are still not expunged, in my view, is not a valid argument because of the statute's definition of what records are contemplated being expunged, and that the release is related to that statute, and that that is how the release should be interpreted.

So therefore, the Court will grant the defendant's motion for summary judgment, and enter a judgment in favor of the defendant as to all counts in the second amended complaint. The Court, because that is dispositive of all of the claims, and so because of that, the Court will not rule on the other defenses raised.

Thank you.

MR. KIM: Thank you, Your Honor.

(Whereupon, the proceedings were concluded.)

CERTIFICATE

Montgomery Transcribers hereby certifies that the attached pages represent an accurate transcript of the duplicated electronic sound recording of the proceedings in the Circuit Court for Montgomery County in the matter of:

Civil No. 183777

DARYL DAVIS,

Plaintiff,

V.

CAROL MAGEE ET AL,

Defendants.

By:
/S/ Susan Landon
Transcriber

DARYL B. DAVIS

V.

CAROL B. MAGEE et al.

IN THE COURT
OF APPEALS
OF MARYLAND

Petition Docket No. 526
September Term, 1999

(No. 328, Sept. Term, 1999,
Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the Debition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/S/Robert M. Bell
Chief Judge

DATE: November 29, 1999

REPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 328

September Term, 1999

DARYL D. DAVIS

V.

CAROL B. MAGEE, ET AL.

Hollander,
*Thieme,
Eyler, Deborah S.,

JJ.

Opinion by Eyler, Deborah S., J.

Filed: August 29, 2001

* Thieme, J., participated in the hearing and conference of this case while an active member of this Court; he participated in the adoption of this opinion as a retired, specially assigned member of this Court.

The Circuit Court for Montgomery County granted summary judgment in favor of Carol B. Magee ("Magee"), the appellee, in an action in tort and for violation of state constitutional rights brought against her by Daryl D. Davis ("Davis"), the appellant. On appeal, the appellant presents three questions for review, which he has subdivided into six questions. We have combined, reworded, and restated the first question, including its subpart, as follows:

> I. Did the circuit court err in granting summary judgment on the ground that Davis's claims were barred by release?

We also shall address the appellant's second question, which we have restated as follows:

> II. Did the circuit court err in granting summary judgment on the ground of release because the expungement statute is unconstitutional?

For the following reasons, we answer both questions "No," and therefore we shall affirm, the judgment of the circuit court. We do not reach the third question, and its. subparts.[1]

---

[1]The questions as presented by the appellant read as follows:

> I. The circuit court erred in entering summary judgment in favor of officer(r) Magee on grounds of the general waiver and release.
>
> A. Because the general waiver

and release provides without any limiting language that it is conditioned on the expungement of ?the record of my arrest, detention or confinement," the ?record" in unambiguous and can only be construed as meaning all records maintained by any state agency.

B. Assuming arguendo that the general waiver (continued...)

FACTS AND BACKGROUND

At the time of the pertinent events, Magee was a police officer assigned to the Youth Services Investigation Division of the Montgomery County Police Department ("MCPD"). On March 11, 1997, a fifteen-year-old girl reported to MCPD that the appellant had engaged in sexual intercourse with her on January 10, 1997. Magee investigated the accusation. One week later, on March 18, 1997, Magee applied for and obtained a statement of charges against the appellant for a third degree sexual offense and a warrant for his arrest. The arrest warrant was executed on March 26, 1997. The appellant was held in custody for 30 hours before being released on bail.

---

[1](...continued)
and release is ambiguous, the circuit court erred in entering summary judgment for Officer Magee and instead should have submitted the release to the jury for resolution of the ambiguity.,

C. This Court's decision in Pantazes v. Pantazes does not compel a different result.

II. Assuming arguendo the the release is enforceable as a matter of contract law, the circuit court erred in entering summary judgment because the expungement statute is unconstitutional.

III. The summary judgment cannot be upheld on other grounds.

A. The summary judgment cannot be upheld on grounds that Mr. Davis failed to give the notice required by the local government tort claims act.

B. The summary judgement cannot be upheld on grounds of immunity.

On June 27, 1997, the appellant appeared in the District Court for Montgomery County for a preliminary hearing. A plea agreement was negotiated at that time, in which the State entered a nolle prosequi on the third degree sexual offense charge and the appellant executed a "General Waiver and Release." The language of the General Waiver and Release tracks that set forth in Md. Rules Form 4-503.2, as the form read in 1997. It states:

> I, Daryl Dwight Davis, hereby release and forever discharge Det. Carol Magee, and the Montgomery County Police Department, all of its officers, agents and employees and any and all other persons from any and all claims which I may have for wrongful conduct by reason of my arrest, detention or confinement on or about March 26, 1997.
>
> This General Waiver and Release is conditioned on the expungement of the record of my arrest, detention, or confinement and compliance with Section 736(c) of Article 27 of the Annotated Code of Maryland, and shall be void if these conditions are not met.
>
> WITNESS my hand and seal this 27th day of June, 1997.

(Italicized entries hand-written in original; remainder in type.) the same time that he signed the General Waiver and Release, the appellant filled out a "Petition For Expungement of Records (Acquittal, Dismissal, Or Nolle Prosequi)," tracking the language of Md. Rules Form 4-504.1. The petition states that the appellant was arrested on a charge of third degree sexual

offense, on March 26, 1997, that "[on] or about June 27, 1997," he was "tried and acquitted, of the said charge was dismissed, or a Nolle Prosequi was entered," and that "[i]f less than three years ha[d] passed since the disposition of the charges a General Waiver and Release" was attached. (Italicized entries hand written; remainder in type.) The petition and General Waiver and Release were filed in the district court criminal case.

There is no expungement order in the record before us. It is undisputed, however, that the district court granted the appellant's petition and issued an expungement order. As an appendix to her brief, the appellee has attached an October 15, 1997 letter from Lieutenant George C. Heinrich of the MCPD to the Honorable Cornelius J. Vaughey, of the District Court for Montgomery County, that refers to the appellant's name, his "MCP ID #," his court case #," his date of arrest, and the charge against him, and states, "We have expunged the above referenced from our files according to your order, and notified the Maryland State Police and FBI of this action."

By letter of October 29, 1997, the Montgomery County Department of Health and Human Services (DHHS) notified the appellant that it had investigated allegations of child abuse against him and had determined that he would remain "indicated"

as a child abuser in its files. The letter further states that the appellant's identification as a child abuser would not be expunged. Later, the appellant learned that the Montgomery County Department of Social Services (DSS) was maintaining his name on its Central Registry of Child Sexual Abusers as an "indicated" child abuser.

On March 9, 1998, in the Circuit Court for Montgomery County, the appellant filed a complaint and request for jury trial against Magee, the MCPD, Police Chief Carol Mehrling, and Montgomery County. On May 6, 1998, he amended his complaint so as to eliminate all the defendants except Magee. The amended complaint set forth claims against Magee for false arrest, false imprisonment, and malicious prosecution. In a second amended complaint, filed on October 26, 1998, the appellant added a claim alleging state constitutional torts. All of the appellant's claims stemmed from Magee's handling of the investigation of the child sexual abuse allegations against the appellant and her conduct in applying for a statement of charges and an arrest warrant, executing the warrant, and taking the appellant into custody.

In her answers to each of Davis's complaints, Magee raised, inter alia, the defense of release.

In the meantime, in March 1998, the Montgomery County Council scheduled a public hearing to address citizen complaints of racism against certain members of the MCPD. The appellant appeared at that hearing to speak about his contention that in having him charged with a third degree sexual offense Magee had acted out of racial animus. Lieutenant Frank W. Young, of the Youth Services Investigation Division of the MCPD, also appeared at that hearing, to speak in defense of Magee. Before Lt. Young spoke, he submitted a document entitled "OIA [Office of Internal Affairs] Case Update," which was dated March 9, 1998. In the "OIA Case Update," Lt. Young identified the appellant as a person who had filed a letter of complaint alleging that he had been improperly investigated by an officer of the MCPD. Lt. Young explained that the OIA had looked into the complaint and had determined that the officer had had sufficient basis on which to take action against the appellant.

The "OIA Case Update" was made available to members of the public who attended the Montgomery County Council hearing. Lt. Young also made an oral statement at the hearing. The text of the statement was prepared in advance and disseminated to members of the public in attendance. Lt. Young did not identify the appellant or Magee by name. He elaborated on the details and disposition of the charges against the appellant, however,

saying, among other things, that his complaint had been reviewed by OIA and that

> it was determined that [Magee] had more than sufficient probable cause to apply for, and obtain, a warrant charging this individual with a felony sexual offense. The charges were nol-prossed by the State's Attorney's Office, because it was felt the victim would be unable to stand the rigors of a trial.

On February 25, 1999, Magee filed a motion to dismiss, or in the alternative for summary judgment, on several grounds, one of which was that, as a matter of law, the appellant's claims were barred by the General Waiver and Release. The appellant filed an opposition and supporting affidavit. He argued that the General Waiver and Release was void because not all of the records that were required to have been expunged under its terms had been expunged. The appellant did not dispute that the MCPD had expunged the records it had of his arrest, detention, and charges. He also did not dispute that the district court had expunged its records. He argued, however, that the police had not expunged the OIA documents prepared by Lt. Young and that the DHHS and DSS had not expunged their records pertaining to his "indicated" status as a child abuser. He also argued that Md. Code, Art. 27, § 736(c) and Md. Rule Crim. Proc. 4-504, both pertaining to expungement of criminal records, are unconstitutional.

In her reply memorandum, Magee argued that all of the records required to be expunged pursuant to the General Waiver and Release had been expunged and, therefore, the General Waiver and Release was not void.

Magee's motion was heard by the circuit court on April 5, 1999. At the conclusion of the hearing, the court granted summary judgment in favor of Magee on the defense of release, explaining:

> I am going to decide the case on the basis of the release.... I find that there is no material dispute of fact as to whether or not there was a release in the case signed by [the appellant], and that the release bars his claim under his second amended complaint.
>
> [The appellant] argues that that should not be so because it is a conditional release, and the conditions have not been met, or at least there is a dispute of fact as to whether the conditions have been met.
>
> The [c]ourt finds that the conditions have been met, that the argument that DSS and Internal Affairs and a memo from Detective Young are still not expunged, in my view, is not a valid argument because of the statute's definition of what records are contemplated being expunged, and that the release is related to that statute, and that that is how the release should be interpreted.

The appellant then noted a timely appeal to this Court.

STANDARD OF REVIEW

When deciding whether to grant a motion for summary judgment, the trial court must determine whether there is a genuine dispute of material fact and, if not, whether one party is entitled to judgment as a matter of law. Md. Rule 2-501; Beatty v. Trailmaster Products, Inc., 330 Md. 726, 737-38 (1993); Petit v. Erie Ins. Exchange, 117 Md. App. 212, 218 (1997). A material fact is one that will somehow affect the outcome of the case. Goodwich v. Sinai Hosp. of Baltimore, Inc., 343 Md. 185, 206 (1996). In order to defeat a motion for summary judgment by showing that there is a genuine dispute of material fact, the party opposing the motion must submit admissible evidence of the disputed fact. Tennant v. Shoppers Food Warehouse, 115 Md. App. 381, 386 (1997). If there is no genuine dispute of material fact, the circuit court resolves the case as a matter of law. Fearnow v. Chesapeake & Potomac Tel. Co., 104 Md. App. 1, 48 (1994), aff'd in part, rev'd in part, 342 Md. 363 (1996).

On review of the grant of summary judgement, we determine whether the circuit court correctly decided that there was no genuine dispute of material fact and whether the trial court reached the correct legal result. Beatty, supra, at 737. Ordinarily, we review a grant of summary judgment based "only on the grounds relied upon by the trial court." Blades v. Woods, 338 Md. 475, 478 (1995).

DISCUSSION

I.

Md. Code (1957, 1996 Repl. Vol.), Art. 27, sections 735 through 741, and Maryland Rules 4-501 through 4-512, govern expungement of criminal records. In Mora v. State, 355 Md. 639, 641 (1999), the Court of Appeals explained that under the expungement statutes, "[t]wo situations are provided for when a person is arrested or otherwise detained but not formally charged, and when a person is formally charged but, for any of the reasons enumerated is not convicted or, if convicted, is pardoned."

Under section 736(a), which applies to the first situation, a person who has been arrested, detained, or confined by a law enforcement agency for certain crimes, and has been released without being charged with the commission of a crime, may give notice to "any law enforcement agency which he believes may have police records concerning that arrest, detention, or confinement, and request expungement of those police records. The notice may not be given before the expiration of the statute of limitations for tort actions arising from the incident unless the person files a General Waiver and Release of any claims he might have against any person for tortious conduct arising from the incident. The General Waiver and Release is to be in the

form as set forth in Md. Rules Form 4-503.2. Md. Rule 4-503(a). If the law enforcement agency denies the request, the person may file an application for expungement of police records in the district court for the county in which the applicant was first arrested, detained, or confined. The district court then may issue an order requiring the agency to expunge the records. 736(e) and (f).

By contrast, § 737 allows, among other things, a person who has been charged criminally on a charge that is later nolle prossed to petition the court in which the proceeding was commenced for expungement of "the police records, court records, and other records maintained by the State of Maryland and its subdivisions, pertaining to the charge." The petition must be filed in the original action. Md. Rule 4-504(a). It may not be filed within three years after the charges have been nolle prossed, however, unless the petitioner attaches an executed General Waiver and Release of all claims he may have against any person for tortious conduct arising from the charge. § 737(d) (2) (i); Md. Rule 4-504(b) . The General Waiver and Release must be "in the form set forth as [Maryland Rules] Form 4.503.2." Md. Rule 4-504(b). If the State's Attorney does not object to the petition within 30 days after service, he is deemed to have consented, and the court must enter an order

requiring the expungement of police records and court records pertaining to the charge. § 737(i); Md. Rule 4-505(d).

Art. 27, § 735 defines, among other terms, "court records," "police records," and "expungement." "Court records" and "police records" are defined inclusively and exclusively: the statute explains what they are and specifies records that do not qualify. "Expungement" is defined only "with respect to court records or police records" and

> means the effective removal of these records from public inspection: (1) By obliteration; (2) By removal to a separate secure area to which the public and other persons having no legitimate reason for being there are denied access; or (3) If effective access to a record can be obtained only by reference to other records, by the expungement of the other records, or the pare of them providing the access.

Against that background, the appellant contends that the circuit court erred in concluding that the General Waiver and Release he signed was effective, and operated to bar his claims against Magee. The appellant does not argue that there was a genuine dispute of material fact precluding entry of summary judgment. Rather, he argues that on the undisputed facts the court erred as a matter of law in its interpretation of the word "record" in the General Waiver and Release. Specifically, the appellant argues that because he had been charged with a crime, his case was governed by § 737, not § 736; therefore, the word "record" as used in the General Waiver and Release included

"other records maintained by the State and its subdivisions pertaining to the charge[,]" among which were records of DHHS, DSS, and OIA. Because those ?other records" were not expunged, he argues, the condition necessary to make the General Waiver and Release operative was not satisfied, and it was void. Accordingly, the General Waiver and Release did not bar his claims against Magee.

Magee counters that the circuit court correctly ruled that because the General Waiver and Release clearly and unambiguously referenced Article 27, § 736, which covers only "police and court records," only police and court records were required to be expunged, and the undisputed facts established that those records indeed were expunged. Therefore, the condition required by the General Waiver and Release was fulfilled, and the circuit court properly ruled that it was effective to bar the claims against her.

As we have explained, the "General Waiver and Release" signed by the appellant was as set forth in Md. Rules Form 4.503.2, as it appeared in the Maryland Rules in 1997. That "General Waiver and Release" first was adopted and made effective by the Court of Appeals on April 1, 1976, one year after the expungement statutes, including sections 736 and 737, were enacted. At that time, it was labeled ?Expungement Form 2." In

1984, "Expungement Form 2" was recodified as Md. Rules Form 4-503.2, as part of the revisions of the Maryland Rules adopted that year.

From 1976 until 1998, the language of the General Waiver and release form was unchanged, and was as it appears in the document signed by the appellant in this case. Of significance to the issue before us, during that 22-year period, the language of the form referred only to § 736 and not to § 737 -- even though § 737 always contained a reference to a General Waiver and Release having to be filed in certain situations in which a petition for expungement was permitted to be filed earlier than three years after the judgment or order of the court. Thus, for that length of time, the language of the form General Waiver and Release that was to be filed with a § 737 petition for expungement, in some situations, was not in sync with the language of § 737 itself, and made no reference to it.

On October 1, 1998, the Court of Appeals amended Md. Rules Form 4-503.2 to include a reference to § 737. Specifically, the following italicized words were added:

> This General Waiver and Release is conditioned on the expungement of the record of my arrest, detention, or confinement and compliance with Section 736(c) or 737 of Article 27 ., as applicable, and shall be void if these conditions are not met.

The Minutes of the meeting of the Court of Appeals Standing Committee on Rules of Practice and Procedure in which this change was endorsed reflect that there was no discussion of the changes and that the changes were made to conform the ?General Waiver and Release" form to the statute. See Minutes of September 6, 1996 meeting, agenda item 7.

Also of relevance to this case, in 1996, the General Assembly amended § 737 to permit a person against whom charges had been brought and then nolle prossed to petition for expungemerit earlier than three years after the nolle prosequi was entered only if the person filed a written ?General Waiver and Release." 1996 Md. Laws, Chap. 613. Before then, and beginning on July 1, 1988, a person in that situation could file a petition for expungement immediately upon entry of the nolle prosequi, without any time limitation and without signing a release. 1988 Md. Laws, Chap. 723.[2]

Thus, when the appellant signed The General Waiver and Release in this case, he was permitted, under § 737, to file a petition for expungement of the nolle prossed charge earlier

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[2]Before July 1, 1988, however, section 737 required that a person against whom a charge was nolle prossed wait three years before filing a petition for expungement. No exception was permitted. Md. Code (1987), art. 27, § 737 (originally enacted as 1976 Md. Laws, Chap. 260).

than three years after the date of entry of the nolle prosequi, but only if he signed a "General Waiver and Release" as set forth in Md. Rules Form 4-503.2; that form had not yet been amended, however, to refer to § 737. Instead, it still contained its original language, referring only to § 736, which did not apply to the appellant's situation. With this legislative history in mind, we turn to the first sub-issue in this case, which is whether the circuit court erred in ruling that the parties intended the General Waiver and Release to apply only to records covered by § 736 and not to records covered by § 737.

Releases are contracts and therefore are construed according to the principles of contract interpretation. "IAI release is to be construed according to the intent of the parties and the object and purpose of the instrument, and that intent will control and limit its operation." Pantazes v. Pantazes, 77 Md. App. 712, 719-20 (1989). "'The primary source for determining the intention of the parties is the language of the contract itself.'" Chicago Title v. Lumbermen's Mut. Ins. Co., 120 Md. App. 538, 548 (1998) (quoting Harford Accident and Indem. Co. v. Scarlett Harbor Assocs. Ltd. Partnership, 109 Md. App. 217, 29t (1996), afl'd, 346 Md. 122 (1997)). "'The written language embodying the terms of an agreement will govern the rights and liabilities of the parties, irrespective of the intent of the

parties at the time they entered into the contract.'" Pantazes, supra, 77 Md. App. at 720 (quoting Goldberg v. Goldberg, 290 Md. 204, 212 (1981)); see also Auction & Estate Representatives, Inc. v. Ashton, 354 Md. 333, 340 (1999); Calomiris v. Woods, 353 Md. 425, 435-36 (1999); Adloo v. H.. Brown Real Estate, Inc., 344 Md. 254, 266 (1996); Nicholson Air Servs. , Inc. v. Board of County Comm'rs, 120 Md. App. 47, 63 (1998); Baltimore Gas & Elec. Co. v. Commercial Union Ins. Co., 113 Md. App. 540, 554 (1997); Shriver v. Carlin & Fulton Co., 155 Md. 51, 64 (1928). '" [W]here a contract is plain and unambiguous, there is no room for construction, and it must be presumed that the parties meant what they expressed. '" Pantazes, supra, 77 Md. App. at 720 (quoting Kasten Constr. v. Rod Enterprises, 268 Md. 318, 328 (1973)) . The language of the contract must be construed as a whole, and effect given to every clause and phrase, so as not to omit an important part of the agreement." Baltimore Gas & Elec., 113 Md. App. at 554; see Bausch & Lomb, Inc. v. Utica Mutual Ins. Co., 330 Md. 758, 779 (1993) .

Whether a contract is ambiguous is a question of law. Ashton, 354 Md. at 341; Calomiris, 353 Md. at 434. Contractual language is considered ambiguous "if, when read by a reasonably prudent person, it is susceptible of more than one meaning."

Calomiris, 353 Md. at 436; accord Ashton, 354 Md. at 340; Heat & Power Corp. v. Air Prods. & Chems., Inc., 320 Md. 584, 596 (1990); see Pacific Indem. Co. v. Interstate Fire & Cas. Co., 302 Md. 383, 389 (1985); Bernstein v. Kapneck, 290 Md. 452, 458 (1981); Pantazes, 77 Md. App. at 718-19.

This Court's decision in Pantazes v. Pantazes, supra, 77 Md. App. 712, is of help to us in addressing the first sub-issue in this case. In Pantazes, Michael Pantazes was charged with malicious destruction of property for damage he allegedly inflicted on a rental car. One Dean Pantazes was the source of the accusation; he had informed an employee of the rental car company that he had seen Michael scratch the car. When Michael appeared in the district court for trial, the State dismissed the charges against him.

Soon thereafter (and well within three years), Michael filed in the district court a petition for expungement of records pursuant to § 737. Attached to the petition was a General Waiver and Release that in all relevant respects was identical to the Form 4-503.2 General Waiver and Release signed by the appellant in the case sub judice. (When Michael filed his petition, § 737 provided that he could not do so earlier than three years after the dismissal without filing a written General Waiver and Release.) The district court granted the petition

and ordered the expungement of all police and court records pertaining to the arrest, detention or confinement on or about 1/20/85." Pantazes, supra, 77 Md. App. at 715.

Michael then brought a civil action for malicious prosecution and defamation against Dean. In the midst of trial, Dean moved for summary judgment, on the ground of release. The trial court denied the motion, on the ground that Michael had not been subjected to any arrest, detention, or confinement, and therefore the General Waiver and Release was of no effect. The jury returned a verdict against Dean, who then appealed the judgment.

This Court affirmed the judgment on the defamation claim, but reversed on the malicious prosecution claim, on the ground of release. We held that although the language of the General Waiver and Release was ambiguous when read in isolation, when read in light of the circumstances of its formation and the 737 expungement petition filed soon after it was signed, it clearly evidenced an intention by Michael and the State ?to satisfy the § 737 requirement that he release 'any person from tortious conduct arising from the charge' in general; includ[ing] his claim for malicious prosecution." 77 Md. App. at 723. We went on to state:

> We hold that the "General Waiver and Release" Md. Rules Form 4-503.2, when filed as part of a petition for expungement of records under Art. 27 § 737, releases all claims which may arise against any person by reason of his or her being investigated, arrested, detained, or confined for, or charged with, a crime. It is not a condition precedent to the operation of the general release that the petitioner be subjected to confinement in jail or prison.

Id.

The case at bar, like Pantazes, involves a situation in which expungement of records clearly is controlled by § 737, but the language of the General Waiver and Release, because it predates the conforming changes adopted in 1998, quotes and makes reference to § 736. Also like in Pantazes, the intentions of the parties to the General Waiver and Release in this case are clear, insofar as the application of § 737 is concerned, from the surrounding circumstances in which the document was signed, including the actions taken by the appellant contemporaneous to the signing of the General Waiver and Release. The State and the appellant, who was represented by counsel, knew that the appellant had been charged with a crime, so that § 736 would not apply to any petition for expungement he might file; and that the charges against him were being nolle prossed, so that, if he wanted to have them expunged in less than three years, he could only do so by [filling] with the petition [for expungement] a written [G]eneral [W]aiver and

[R]elease, in proper legal form, of all claims [he may have had] against any person for tortious conduct arising from the charge." § 737(d) (2) (i). The appellant completed and filed his expungement petition, under § 737, at the same time that he signed the General Waiver and Release. Thus, all parties to that document plainly intended that the charges against the appellant would be nolle prossed and the appellant would be permitted to file an immediate petition in the district court for expungement of records in exchange for his releasing all claims he might have had against Magee and the MCPD and its officers, agents, and employees) for tortious conduct arising from the charges.[3]

Having concluded that the parties to the General Waiver and Release that the appellant signed intended, by its language, to effect a "General Waiver and Release" pursuant to § 737, we next address the second sub-issue. Given that the terms of the General Waiver and Release were governed by § 737, did the

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[3]As we explained in Pantazes, the reason that a general tort release is required for a petition for expungement to be filed in less than three years is that limitations will not have run; permitting the records pertaining to a charge to be expunged in less than three years without requiring that a release be given would expose the potential defendants in a tort action arising out of the charge to the unfairness of having to defend against a claim when the records pertaining to it have been destroyed or made inaccessible. 77 Md. App. at 719.

undisputed facts establish as a matter of law that the conditions for the General Waiver and Release were satisfied, so it was effective and not void? The appellant argues that because the General Waiver and Release was intended by the parties to be governed by § 737, the conditions that had to be met for it to become operative included that all records capable of being expunged under § 737 must have been expunged. Therefore, if the DHHS, DSS, and OIA documents fell within the ambit of § 737, but were not expunged, the conditions were not satisfied, and the General Waiver and Release was void. We disagree.

It is not necessary for us to decide whether the records of DHHS, DSS, and OIA with which the appellant is concerned are ?other records maintained by the State of Maryland and its subdivisions, pertaining to the charge[,]" under § 737(a), as he contends, because even assuming they are, the conditional language of the General Waiver and Release does not have the meaning the appellant ascribes to it. The General Waiver and Release was ?conditioned on the expungement of the record" of Davis's arrest, detention, confinement, and charges, under § 737, and on ?compliance with" section 737. We must examine the substance of § 737 and the procedure for obtaining an order for expungement under that statute, as explicated in Md. Rules 4-504

through 4-512, to determine the precise meaning of that conditional language.

As explained above, section 737 gives a person who was charged with a crime the right to file a petition to expunge ?police records, court records, and other records maintained by the State and its subdivisions, pertaining to the charge," in certain enumerated situations, and at certain enumerated times. Unlike a notice and request for expungement under § 736, which is filed with a law enforcement agency, see § 736 a), a petition for expungement must be filed with the court in which the charge was pending. § 737(c). Thus, a § 737 petition is not an application to a State or local agency to expunge records -- it is an application to the court in which the charge was brought to issue an order directing that records be expunged. The § 737 petition must be served on the State's Attorney, who then has 30 days in which to file an objection. § 737(i). If no objection is filed in that time frame, ?the court shall enter an order requiring the expungement of police records and court records pertaining to the charge." § 737(i). The order for expungement ?shall be substantially in the form set forth" as form 4-503.2, ?as modified to suit the circumstances of the case." Md. Rule 4-508(a).

In the case sub judice, the appellant's petition for expungement of records asked the district court to

> enter an Order for expungement of all police and court records pertaining to the above arrest, detention, confinement and charge.

Apparently, the State's Attorney did not object to the petition, and the district court granted it, without holding a hearing.

As is evident from the above-quoted language, the appellant did not ask the district court to enter an order for expungement of records other than ?police and court records." In other words, the appellant did not modify the petition, as he was permitted to do, to request an expungement order either for ?other records maintained by the State of Maryland and its subdivisions,"§ 737(a), or, more specifically, for records of the DHHS, DSS, or any other State agency. Section 737 draws a distinction between ?police records," ?court records," and ?other records maintained by the State of Maryland and its subdivisions," so as to make plain that a request for ?police and court records" does not include a request for ?other records." Moreover, as we have explained, § 735 sets forth definitions for, among other terms, ?court records" and ?police records." Those definitions by plain reading do not encompass records of DHHS or DSS. ?Court records" are those ?official records maintained by the clerk or other court personnel pertaining to

a criminal proceeding." § 735(b). ?Police records" are, with exceptions, ?all official records maintained by a law enforcement agency of the Central Repository pertaining to the arrest and detention of or further proceeding against a person on a criminal charge or for a suspected violation of the criminal law."

Because expungement of records under section 737 can occur only upon petition and the issuance of an order for expungement, and not by independent acts of the State's Attorney, court personnel, or law enforcement authorities, the conditions of "expungement" and "compliance" that were required to be fulfilled for the General Waiver and Release in this case to be effective necessarily were conditions that had to be fulfilled upon issuance of a court order for expungement. In other words, the conditions would be satisfied by the MCPD, Magee, and any other person or entity complying with a court order directing them to expunge records. To the extent that the appellant wanted to have DHHS and DSS records pertaining to the child sexual abuse allegation and charges against him expunged, and to the extent that he was of a mind that he was entitled by § 737 to have those records expunged, it was incumbent upon him to ask the district court to order them expunged. Again, he did not make that request. Accordingly, there was and could not be a factual

basis for the appellant's contention that a condition precedent to the General Waiver and Release was not satisfied because the DHHS and DSS records were not expunged; the only records required to be expunged were those ordered expunged -- and DHHS and DSS records were not ordered expunged because the appellant did not ask for them to be.[4]

The issue respecting the OIA records is somewhat different because those records are ?official records maintained by a law enforcement agency," and thus meet the first prong of the definition of a ?police record." We conclude, nevertheless, that expungement of the OIA records was not required by the district court's expungement order, as a matter of law, and therefore the failure to do so did not make the General Waiver and Release void.

The order of expungement was issued by the district court sometime before October 15, 1997. The OIA records that the

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[4]One of the appellant's central arguments -- that records of DHHS and DSS fall within the scope of the ?other records" language of § 737(a), properly could have been raised and decided in the district court case if the appellant had included those records in his petition for expungement. If the district court had denied the petition insofar as those records were concerned, the appellant could have taken an appeal and the issue would have been squarely presented. The issue is not squarely presented here, for the reasons we have explained. We note, however, that the appellant is not precluded from filing another petition for an expungement order for those records.

appellant argues should have been expunged did not exist then. Indeed, they were not created until March 1998, some four and one-half months later, when Lt. Young prepared the ?OIA Case Update" and transcript of his written remarks for presentation at the Montgomery County council hearing. The ?police records" encompassed in the district court's expungement order could not have included records not even in existence when the order was issued. Accordingly, there were no facts put forth by the appellant to support his assertion that the MCPD failed to comply with the expungement order.[5]

II.

The appellant also contends that the circuit court erred in granting summary judgment in favor of Magee because the Maryland expungement statutes are unconstitutional, in that they imposed upon him an obligation to forfeit his constitutional right to sue the State as a condition to obtaining expungement of his records. He argues that a State may not condition the receipt of a government benefit on the waiver of a constitutional right. See Dolan v. City of Touggourt, 512 U.S. 374, 394 (1994) (?under the well settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional

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[5]We express no opinion as to whether the 0IA documents the appellant contends should have been expunged are documents excluded from the definition of ?police records," in § 735(e).

right... in exchange for a discretionary benefit where the property sought has little or no relationship to the benefit"); Perry v. Sinderman, 408 U.S. 593, 597 (1972) (the government may not deny a person a benefit ?on a basis that infringes his constitutionally protected interests"). He maintains that there is no legitimate State interest in conditioning expungement on a release of the State and its agents and employees from liability.

Newton v. Rumery, 480 U.S. 386 (1986), is instructive on this issue. In that case, Rumery relinquished his personal right to sue the town of Newton, New Hampshire, in exchange for all criminal charges against him being dismissed. The issue before the Supreme Court was whether such a ?release-dismissal" agreement was unenforceable as against public policy. The Court agreed that in certain instances a release-dismissal agreement ?may tempt prosecutors to bring frivolous charges, to protect interests of other officials" but concluded that ?a per se rule of invalidity fails to credit other relevant public interests and improperly assumes prosecutoriai misconduct." Id. at 385 (footnotes omitted). The Court stated:

> In many cases a defendant's choice to enter into a release-dismissal agreement will reflect a highly rational judgment that the certain benefits of escaping criminal prosecution exceed the speculative benefits of prevailing in a civil action. Rumery's

> voluntary decision to enter this agreement exemplifies such a judgment .... The benefits of the agreement to Rumery are obvious: he gained immunity from criminal prosecution in consideration of abandoning a civil suit that he may well have lost.

Id. at 394. by counsel, The Court held that because Rumery was represented personally benefitted from the agreement, and voluntarily waived his right to sue under the release-dismissal statute, the agreement did not adversely affect the public interest and was valid. 480 U.S. at 398.

The expungement statutes at issue in this case, to the extent they deny any benefit of the law at all, do so in a much less burdensome way than was at issue in Rumery. As we already have explained, under § 737, had the appellant waited three years from the date the charge against him was nolle prossed to petition for expungement, he would not have been required to release any related tort claims he might have had. The law only requires a petitioner under § 737 to execute a General Waiver and Release when a case has been nol prossed if the petition is filed within the three-year limitations period for tort actions. A person wishing to have his record expunged but not wanting to release his potential tort claims need only wait three years to petition for expungement. The reason potential tort claims must be released before records will be expunged in the three-year period, as we have explained, is that without such a release,

potential defendants could be placed in the position of having to defend themselves against claims when the records they would need to do so had been destroyed or made inaccessible at the plaintiff's request.

In this case, the appellant made a voluntary and rational decision, with the advice of counsel, to release his potential tort claims in exchange for obtaining immediate expungement of records. ?The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow." McMann v. Richardson, 397 U.S. 759, 769 (1970). Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." Newton, 480 U.S. 386, 393-94; Crampton v. Ohio, decided with McGautha v. California, 402 U.S. 183, 213 (1971). The requirement in § 737 that a defendant charged with a crime release potential related tort claims if the charge is nolle prossed and he seeks to expunge the records pertaining to it before limitations would expire on the potential claims is rationally based and not unconstitutional.

JUDGMENT AFFIRMED.
COSTS TO BE PAID BY THE APPELLANT.

Daryl D. Davis	In the
Appellant	COURT OF SPECIAL APPEALS
VS.	No. 328
Carol B. Magee et al.	September Term, 1999
Appellees	

ORDER

This Court having read and considered Appellant's Motion for the reported opinion filed on August 29, 2001 in the captioned appeal, it is this 29th day of November, 2001, by the Court of Special

ORDERED that the Motion for Reconsideration is denied.

CHIEF JUDGE'S SIGNATURE
APPEARS ON ORIGINAL ORDER

CHIEF JUDGE

MANDATE
Court of Special Appeals
No. 00328, September Term, 1999

Daryl D. Davis

VS.

Carol B. Magee et al.

JUDGMENT: August 29, 2001: Judgment affirmed.Costs to be paid by the appellant.
Reported opinion by Eyler, J.

September 27, 2001: Motion for Reconsideration filed by counsel for the appellant.

November 29, 2001: Motion for Reconsideration denied.

November 29, 2001: Mandate issued.

From the Circuit Court: for MONTGOMERY COUNTY
000000183777

DARYL D. DAVIS

V.

CAROL B. MAGEE, et al.

IN THE COURT OF APPEALS
OF MARYLAND
Petition Docket No. 560 September Term, 2001
(No. 328, Sept. Term, 1999, Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/Robert M. Bell
Chief Judge

DATE: February 7, 2002

DISTRICT COURT OF MARYLAND FOR
Montgomery County Case No.: 4D00036964
Located at
27 Courthouse Square
Rockville, Maryland 20850

STATE OF MARYLAND
COMPLAINANT
Officer: MAGEE, CAROL
Agency/Subagency. MCP HQ15
ID: 85

VS

DAVIS, DARYL DWIGHT
12419 FLACK STREET
SILVER SPRING, MD 20906

CC#: SIP:
Eyes: BRN DL#: D120-135-157-242 MD
Race: 1 Sex: M Ht: 5 11 Wt: 200 Hair. BLK
DOB: 03/26/58

STATEMENT OF CHARGES

UPON THE FACTS CONTAINED IN THE APPLICATION OF MAGEE, CAROL IT IS FORMALLY CHARGED THAT DAVIS, DARYL DWIGHT at the dates, times, and locations specified below.

NUM CHG/CIT	STATUTE	PENALTY
001 3 3600	27464 B	10 Y

DESCRIPTION OF CHARGE
SEX OFFENSE THIRD DEGREE
On or About 01/10/97

12419 FLACK STREET, SILVER SPRING, MONTGOMERY COUNTY, MARYLAND did unlawfully commit a sexual offense in the third degree upon BONNIE MURIEL SANTMYER in violation of Article 27, Sec. 464B of the Annotated Code of Maryland. Against the Peace, Government, and Dignity of the State.

Date:03/18/97 Time:12:54:22
/S/Judicial Officer
6523

DISTRICT COURT OF MARYLAND FOR
Montgomery County
Located at 27 Courthouse Square
Rockville, Maryland 20850
Case No. 4D00036964
STATE OF MARYLAND

VS

DAVIS, DARYL DWIGHT
12419 FLACK STREET
SILVER SPRING, MD 209O6
CC#: SID:
Local ID: DL#:
Race: 1 Sex: M Ht: 5' 11" Wt.: 200 Hair: BLK
DOB: 03/26/58

Charge / Statute / Arrest
SEX OFFENSE THIRD DEGREE [27 464B]

ARREST WARRANT ON CHARGING DOCUMENT
STATE OF MARYLAND, Montgomery County:
TO ANY PEACE OFFICER, Greetings:

YOU ARE ORDERED to arrest and bring before a judicial officer the above-named Defendant as soon as practicable and without unnecessary delay. If a judicial officer is not readily available, this Warrant shall authorize the prisoner's detention until compliance is had with Rule 4-212 and the arresting officer is authorize and required to comply with Rule 4-212.

IF THE DEFENDANT IS NOT IN CUSTODY FOR ANOTHER OFFENSE,

Initial appearance is to be held in county in which Warrant was issued.

IF THE DEFENDANT IS IN CUSTODY FOR ANOTHER OFFENSE, this Warrant is to be lodged as a

detainer for the continued detention of the Defendant for the offense charged in the charging document. When the Defendant is served with a copy of the charging document, and Warrant, the Defendant shall be taken before a judicial officer of the District Court.
Date: 03,/18/97 Time: 12:56:06
/S/Commissioner: ID: 6523

Given to: MONTGOMERY COUNTY POLICE-HEAD QUARTERS

APPLICATION FOR SEARCH AND SEIZURE WARRANT IN MONTGOMERY COUNTY, MARYLAND

C. The following information is given in support of this application:

B. (W/F/15. DOB:O3-30-81) notified Montgomery County Police on March 9, 1997 that she had been having a sexual relationship with Douglas Malcolm Allen (W/M/47 DOB:O7-23-49). B. stated that she had met Douglas Allen when he came to live in the family residence as a roommate on November 1995. B. related repeated sexual experiences with Allen and her mother, Karen Santmyer. Karen Santzmyer also maintained a friendship with Daryl Dwight Davis (l/M DOB: 03-26-58) and she would allow her daughter, B. too accompany Davis. B. states that she began having vaginal intercourse with Daryl Davis when she was thirteen years of age. The first occasion occurred in Davis' vehicle when he had B. sit on his lap. B. continued that she has had vaginal intercourse with Daryl Davis approximately thirty times. The last occasion of vaginal intercourse between B. and Darvl Davis occurred on January 10, 1997. B. describes Davis' penis as "pretty big, circumcised, slanted when he has a hard on with a small dot, something like a birthmark, dented on one side" near or on the end of his penis.

The affiant believes that probable cause exists to support the charge of Third Degree Sex Offense. Annotated Code of Maryland. Art. 27. Sec. 464B. The affiant requests a search warrant issue for the above person for the description of the described item.

DISTRICT COURT OF MARYLAND FOR
Montgomery County

Located at
27 Courthouse Square
Rockville, MD 20850-2325

Case No. 4D00036964

STATE OF MARYLAND

VS

DAVIS, DARYL DWIGHT
12419 FLACK STREET
SILVER SPRING, MD. 20906

CC#: SID: Loc I.D. 146194
Eyes: BRN Hair: BLK
Race: 1 Sex: M Height: 5' 11" Weight: 200
DOB: 03/26/58

DEFENDANT TRIAL SUMMARY

A PRELIMINARY HEARING on the above case was held today, 06/27/97
by Judge LEE M. SISLEN.

The Court's finding is as follows:

001 SEX OFFENSE THIRD DEGREE
Plea - OTHER PLEA
Verdict - NOLLE PROSEQUI

DISTRICT COURT OF MARYLAND FOR
MONTGOMERY COUNTY
27 COURTHOUSE SQUARE (C) 0601
ROCKVILLE MD 20850-2325

CASE -NUMBER: 4D00036964

TO: DAVIS, DARYL DWIGHT
12419 FLACK STREET
SILVER SPRING, MD 20906

STATE OF MARYLAND

VS.

DAVIS, DARYL DWIGHT

NOTICE

IN ACCORDANCE WITH MARYLAND RULE 4-247, YOU ARE HEREBY NOTIFIED THAT ON JUNE 27, 1997, THE STATE'S ATTORNEY ENTERED A NOLLE PROSEQUI IN THE ABOVE CASE. THAT IS, THE STATE'S ATTORNEY HAS DETERMINED THAT THE CASE WILL NOT BE PROSECUTED.

BY: JEFFREY L. WARD DATE: 06/27/97
(CLERK)

DISTRICT COURT OF MARYLAND FOR
MONTGOMERY COUNTY
Located at 27 COURTHOUSE SQUARE
ROCKVILLE, MD 20850-2325

STATE OF MARYLAND
VS.
DARYL DWIGHT DAVIS
D.O.B 03/26/58

PETITION FOR EXPUNGEMENT OF RECORDS (ACQUITTAL, DISMISSAL, OR NOLLE PROSEQUI)

1. On or about MARCH 26, 1997, I was arrested by an officer of the MONTGOMERY COUNTY POLICE DEPARTMENT at SILVER SPRING Maryland, as a result of the following incident (Issuance of an arrest warrant) and was charged with the offense of 3rd. Degree Sex Offense

2. On or about June 27, 1997,I was tried and acquitted, or the said charge was dismissed or quashed, or a Nolle Prosequi was entered.

3. If less than three years have passed since the disposition of the charges, I have attached hereto a General Waiver and Release.

WHEREFORE, I request the Court to enter an Order for Expungement of all police and court records pertaining to the above arrest, detention, confinement and charges.

I solemnly affirm under the penalties of perjury that the contents of this Petition are true to the best of my knowledge, information and belief and that the arrest to which this Petition relates was not made for any violation of the Vehicle Laws of the State of Maryland or any traffic law, ordinance, or regulation.

Date: 06/27/1997 /S/Daryl Davis

12419 Flack Street
Silver Spring, MD 20906
(301) 929-8764

DISTRICT COURT OF MARYLAND FOR
MONTGOMERY COUNTY
Located at 27 COURTHOUSE SQUARE
ROCKVILLE, MD 20850-2325

STATE OF MARYLAND

VS.

DARYL DWIGHT DAVIS (Defendant)
12419 FLACK STREET
SILVERS SPRING, MD 20906
PHONE # (301)929-8764

GENERAL WAIVER AND RELEASE

I, Daryl Dwight Davis, hereby release and forever discharge, Det. Carol McGee (Complainant), and the Montgomery County Police Department (Law Enforcement Agency) all of its officers, agents, and employees and any and all other persons from any and all claims which I may have for wrongful conduct by reason of my arrest, detention, or confinement on or about March 26, 1997.

This General Waiver and Release is conditioned on the expungement of the record of my arrest, detention, or confinement and compliance with Section 736 (c) of Article 27 of the Annotated Code of Maryland, and shall be void if these conditions are not met.

WITNESS my hand and seal this 27th day of June, 1997.

/S/Daryl Davis

Child Abuse and Neglect
LOCAL DEPARTMENT REVIEW

Date: 10/29/1997
OAH Case #: 97-028380
LDSS Casehead Case #/Client ID #: 130014170

From: Sheila Dennis, Assessment Administrate
MCDHHS/CWS
130 Picard Drive, Floor 4
Rockville, MD 20850-4320

To: Daryl Davis
12419 Flack Street
Silver Spring, MD 20906

Dear Mr. Davis:

As a result of your request for a hearing and pursuant to the Family Law Article §5-706.1; the local department conducted a review of the child abuse and neglect record of the investigation completed on 07/09/1997 in which you were identified as the alleged abuser or alleged neglector. The purpose of this review was to determine whether the finding shall be amended, modified or expunged.

The following action was taken as a result of the local department review:

1. The finding:

_____ has been changed to "unsubstantiated";
_____ has been changed to "ruled out";
__X__ will remain "indicated"

_____ will remain"unsubstantiated";
_____ will remain the same but the type of maltreatment has been changed from

abuse to neglect;
_____ will remain the same but the type of maltreatment has been changed from neglect to abuse.

2. Your identification as the:
_____ alleged abuser will be expunged from the record;
_____ alleged neglector will be expunged from the record;
__X__ alleged abuser will not be expunged from the record;
_____ alleged neglector will not be expunged from the record.

3. Clerical error:
_____ The clerical error (stated below) that affected your finding has been corrected:
__X__ There was no clerical error identified that affects the finding.

A copy of this letter is also being sent to the Office of Administrative Hearings. The Office of Administrative Hearings, will take the appropriate action based on the action taken by the local department as indicated on this letter. The Office of Administrative Hearings will notify you of the status of your appeal.

Sincerely,
/S/ Sheila Dennis
(Assessment Administrate)

C. James C Savage, Atty.
200 A Monroe Street, #225
Rockville, MD 20850-4421

OLA CASE UPDATE
Date: March 9, 1998

COMPLAINANT: Daryl Davis

COMPLAINT: Unlawful Arrest

INCIDENT DATE: 03-26-97

COMPLAINT DATE: 06-30-97

CHIEF'S LETTER DATED: 07-24-97

FIRST CONTACT: 07-10-97

ALLEGATIONS: Mr. Davis filed a letter of complaint on June 30, 1997, in which he alleged he was improperly investigated by an officer of the MCPD. The Office of Internal Affairs sent Mr. Davis a letter acknowledging his complaint.on July 10, 1997, which stated an officer would contact him for an interview. The investigation that resulted in action involving Mr. Davis was re-evaluated. After review, the MCPD determined the investigator had sufficient basis to take the action involving Mr. Davis. On July 24, 1997, a letter was sent to Mr. Davis informing him that no administrative violations were identified by Chief Mehrling. A second letter from Mr. Davis to Chief Mehrling, dated September 8, 1997, expressed his displeasure at not being interviewed as the letter from the Office of Internal Affairs noted.

Several friends of Mr. Davis' wrote letters in support of his position and a meeting was held at police headquarters with Mr. Davis and three others on October 21, 1997. At the meeting, MCPD officers

obtained a waiver from Mr. Davis pertaining them to discuss his circumstances with the others attending the meeting. MCPD representatives explained to Mr. Davis that a review of the matter indicated that the police action taken was appropriate.

Letters received from Mr. Davis are attached to this summary. Attempts to communicate with Mr. Davis have been frustrated by the tone and tenor of his communications with the MCPD. The MCPD attempted to address Mr. Davis' concerns by reevaluating the investigation and the actions involving him but these efforts were not satisfactory to him. No further efforts are contemplated by the MCPD.

CASE STATUS: Closed-Unfounded

NOTE: Mr. Davis filed a Notice of Claim with Montgomery County, a prerequisite for filing suit against the County for damages on December 11, 1997. The Notice of Claim is pending evaluation.

Lt. Frank W. Young
2300 Randolph Road
Wheaton, Maryland 20902
(301) 217-4300

Good evening. My name is Lieutenant Frank Young, Director of the Youth Services Investigations Division of the Montgomery, County Police Department. I would like to thank Councilman Leggett, and the members of the County Council, for the opportunity to say a few words this evening. I have been a Montgomery County Police officer for 28 years, and have always felt pride in our police department's record of fairness. Whenever I would hear allegations, of racism & brutality made against other police departments, I was always proud that my department didn't have those problems.

The overwhelming reason that I am here tonight, is because one of the complaints the NAACP has championed, involves a complaint against an investigator in the Youth Services Investigations Division. Ms. Myma Taylor, spoke earlier regarding this (investigation, on behalf of the complainant. A female investigator, in my division, conducted an investigation of suspected child abuse and sexual offenses. She identified a number of individuals involved in this incident, and ultimately arrested three people, including the person who made the complaint to the police department and the NAACP.

This person sent a letter to Chief Mehrling and alleged that he was unjustly arrested. The complaint was sent to my office for review. It was reviewed by Sergeant Richard Cage and myself and it was determined that the investigator had more than sufficient probable cause to apply for, and obtain, a warrant charging this individual with a felony sexual

offense. The charges were nol-prossed by the State's Attorney's Office, because it was felt the victim would be unable to stand the rigors of a trial. The other two individuals, who were charged, in the case, pleaded guilty. A letter was prepared and sent to the complainant informing him of our conclusions. A number of people wrote letters, protesting that the complainant had not been interviewed during the internal investigation. His complaint was that he was unfairly arrested, and our inquiry, indicated that the arrest was legal and complied with rules of evidence, and he was simply sent a letter. We did in fact meet with him and his representatives, after that letter was sent, and explained the probable cause used to substantiate the charges. Ms. Taylor asked why did we agree to-meet with her, after she wrote her letter, inforang we only agreed to meet, because she was white. I set up that meeting, and to be honest, I had no idea what race she was, nor did I care.

All of our interaction with the complainant, has been very polite and professional; however, the same cannot be said for his correspondence. His first letter to Chief Mehrling referred to the female investigator, from the Youth Services Investigations Division, as a "man-hating, racist, lesbian bimbo who is a shoddy detective, if one at all! In his second letter, dated September 8, 1997, to Chief Mehrling, he stated to the chief "you are a worthless excuse for a police chief and a bold-faced liar", and "You, (name withheld) and (name withheld) are all ignorant imbeciles and will be taught a lesson." In another letter, addressed to the District Commander of the Wheaton Glenmont Station, dated September 24, 1997, the complainant wrote" I would have approached you and introduced myself to express my concerns to you in person;

however, you were preoccupied escorting that worthless piece of crap (Carol A. Mehrling) you call your chief to the car." In the same letter, he stated the chief, and the investigator, were "Lazy, racist bimbos like Carol Mehrling, Detective (name withheld)," and continued (they) "are the reason there is severe animosity between the community and the police department." In a letter addressed to the Youth Services Investigations Division investigator, dated September 29, 1997, the complainant say's "You are a lying, corrupt, lazy, racist, sorry excuse of a police officer. In fact, you amount to nothing more than a stupid moron." In another letter, addressed to directly to me at the Youth Services Investigations Division, dated January 10, 1998, the complainant states "You are in fact a liar and a dishonest cop." In this same letter he inquires of me "If the young man who comes to the house to pick up Courtney (my daughter) for a date was Black, would I react the same way if he was White." I don't owe this individual any answers about my personal life, but I can assure you my daughter, Courtney, was brought up to respect all people and races, and I would accept anyone she would bring to my home. My child abuse investigator, who has had these unfair accusations made against her, has 25 years in law enforcement, and has decided to end her career conducting child abuse investigations. She is none of the things this person wrote of her. I have always had the highest regard for the NAACP, but my respect has decreased when a good organization champions a person such as this individual.

In conclusion, I would like to quote from an article, entitle "What Would you do (I was on Ruthann's hit list)", written by John Harrison, that was published,

Sunday, March 8, 1998, in the Washington Post's Outlook Section. "So, once again, imagine that serious person (Katherine Savage former SA; now a District Court Judge) calls you one day and tells you that someone, perhaps even a professional killer, was trying to kill you. What do you do? What can you do? Not much, except carry around a telephone number & hope for a police department as good as Montgomery County's"

Thank you.

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

DARYL D. DAVIS
Plaintiff

Case No.: 183777

CAROL B. MAGEE
Defendant

PLAINTIFF'S SUPPLEMENTAL OPPOSITION TO MOTION TO DISMISS THE AMENDED COMPLAINT

THE MOTION TO DISMISS MUST BE DENIED TO THE EXTENT THAT IT IS BASED ON THE RELEASE BECAUSE THE STATUTORY AND COURT RULE REQUIREMENTS THAT A CITIZEN MUST RELEASE HIS CLAIMS AS A CONDITION TO HAVING COURT AND POLICE RECORDS EXPUNGED ARE UNCONSTITUTIONAL

By requiring a plaintiff seeking the expungement of police and court records concerning an unlawful arrest and imprisonment to release all claims arising out of the false arrest and imprisonment, Md. Code Ann. art. 27 § 736(c) and Md. R. Civ. Pro. 4-504 impose unconstitutional conditions on the statutory right to expungement. The release requirement accomplishes indirectly what the state could not do directly - viz., it bars a plaintiff injured by police misconduct from access to the court and prevents the plaintiff from receiving due process of law. Consequently, regardless of whether Mr. Davis has a contractual right to rescind the release, the release is unenforceable as a matter of law because

it was executed by cortaid of an unconstitutional statute and court rule.

The United States Supreme Court has long recognized that a state may not condition the receipt of a government benefit on the waiver of a constitutional right. Perry v. Sindermann, 408 U.S. 593, 597 (1972)("If]or at least a quarter century, this Court has made clear even though a person has no right to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests"). As one court has explained, this rule is known as the doctrine of unconstitutional conditions:

> The doctrine of unconstitutional conditions provides that the Government cannot condition the receipt of a government benefit on waiver of a constitutionally protected right. It functions to insure that the Government may not indirectly accomplish a restriction on constitutional rights which it is powerless to decree directly.

Louisiana Pacific v. Beazer Materials & Services, 842 F. Supp. 1243, 1248 (E.D. Cal. 1994). See also Dolan v. City of Tigard, 512 U.S. 389, 394 (1994)("[u]nder the well settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right...in exchange for a discretionary benefit where the property sought has little or no relationship to the benefit").

Where a state by statute or otherwise requires a citizen to release or waive a constitutional right in order to receive a government benefit, a three-step analysis is

employed to determine if the release is constitutional:

> First, the plaintiff must establish that a constitutional right is implicated; second, the plaintiff must demonstrate that the right is being impinged upon as measured by standards applicable to a direct violation of the identified constitutional right; third, if the plaintiff satisfies these two preconditions, the Government must demonstrate the proprietary of seeking a waiver of a constitutional right in light of both its legitimate interest in a waiver, if any, and the benefit to be conferred upon the adverse party.

842 F. Supp. at 1249-50. See also Clark v. County of Placer, 923 F. Supp. 1278 (E.D. Cal. 1996) (doctrine of unconstitutional conditions rendered waiver of right to sue as precondition for female to engage in race car racing on public course invalid).

In the instant case, all three elements of the doctrine are satisfied. First, Mr. Davis had a constitutional right to access to the courts to litigate his claims against Officer Magee for false arrest, false imprisonment, and malicious prosecution. This right is guaranteed by the Maryland Constitution:

> That every man for any injury done to him in his person or property, ought to have remedy by the course of the Law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the land.

Md. Const. art. 19. Construing this provision, the Court of Appeals has ruled that a unreasonable statutory

restriction on access to the courts is unconstitutional. Johnson v. Maryland State Police, 331 Md. 285, 628 A.2d 162 (1993) . Because Mr. Davis also had a property right in his cause of action against Officer Magee, Mr. Davis also had both a federal and Maryland constitutional right to have his claims adjudicated by due process of law.

Second, Md. Code Ann. art. 27 § 736(c) and Md. R. Crim Pro. 4-504, by requiring Mr. Davis to waive these rights through the execution of a release, directly deny Mr. Davis these constitutional rights. In other words, if the release is enforced, Mr. Davis will not be permitted to have access to the courts or the due process to which every citizen with a legal claim is entitled.

Md. Code Ann. art. 27 § 736(c) and Md. R. Crim Pro. 4-504 accordingly can pass constitutional scrutiny only if the state can show "the proprietary of seeking a waiver of [the] constitutional right[s] in light of both its legitimate interest in a waiver, if any, and the benefit to be conferred upon the adverse party." As the court explained in Louisiana Pacific, this requirement means that "the waiver is rationally and fairly related both to a legitimate government interest and to the benefit conferred." In other words, the state must show both that a legitimate reason underlies the waiver and that this reason has a "close fit" with the benefit conveyed:

> Before the government can require a citizen to surrender a constitutional right as part of a settlement...it must have a legitimate reason for including the waiver in the particular process. A legitimate reason will almost always include a close nexus- a tight fit- between the specific interest the government seeks to advance in the dispute underlying the litigation involved and the specific right waived.

Davies v. Grossmont, 930 F.2d 1390, 1399 (9th Cir. 1991). See also Parks v. Watson 716 F.2d 646, 652 (9th Cir. 1983)(to pass constitutional muster, the proposed condition of settlement must directly relate to the subject of the benefit).

There is no legitimate reason for requiring a plaintiff to waive his constitutional right to sue for injuries caused by the police as a condition to having police and court records expunged. The rationale for this statute is that a police officer accused of false arrest must have access to the police and court records in order to defend herself. But the statute effectively and improperly creates an irrefutable presumption that police officer access to the expunged court and police records is always critical to the officer's defense. The instant case demonstrates the flaw in the rationale. First, with respect to the court records, the claims against Mr. Davis were noll prossed about three months after the arrest. There accordingly are very few court records in the file of this case. And there is absolutely nothing in the court records that provide any defense to Officer Magee or assistance in defending against the claims. To the contrary, evidence in the court records that the state's attorney believed the charges against Mr. Davis should not be prosecuted is strong evidence for Mr. Davis. Second, with respect to the police records, any records expunged which do contain information helpful to Officer Magee are duplicative of her investigatory flies and other work product records used in the course of the investigation of Mr. Davis. Md. R. Civ. Pro. 4-502(i) expressly excepts such records from the definition of "police records" as used in the expungement statute. Consequently, these records have not been expunged and are available to Officer Magee should she need them for her defense.

The expungement statute's release of all claims requirement is also a "poor fit" when compared to the purported justification that police officers need the records for their defense. This goal could easily be accomplished by means far less burdensome than the compelled waiver of an innocent citizen's right to access to the courts and due process. For example, instead of conditioning expungement on a waiver of claims, expungement could be conditioned on agreement by the plaintiff for the officer to have access to the records for purposes of her defense. It must be remembered that expunged files are not destroyed but are simply removed to a secure area where members of the public cannot see the file. By limiting access to the police officer if a suit is filed, the citizen is able to prevent public access to the records until the citizen decides to go public himself with the false arrest information through the filing of a law suit. This would provide full protection for the police officer without requiring the citizen to waiver his constitutional rights.

Finally, the release requirement has no relation to the benefit conferred. There is absolutely no reason why an innocent citizen should be forced to waive his claims against a police officer merely because the citizens wants to have the records of the false arrest expunged. As the court in Louisiana Pacific explained:

> Under the standards examined above, the doctrine of unconstitutional conditions operates in a settlement context as a limitation upon the government's power to exact a waiver of constitutional rights by, among other things, disallowing the making of an offer which "can't be refused." Put another way, the more an offer is "your money or your life" -i.e, the presentation of two undesirable alternatives, the less it is

> likely to be a legitimate offer of compromise and the more likely it is an attempt to unlawfully coerce the surrender of a constitutional right.

842 F. Supp. at 1254. Md. Code Ann. art. 27 § 736(c) and Md. R. Crim Pro. 4-504 present citizens abused by police misconduct with electing between two undesirable

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

DARYL D. DAVIS

Plaintiff

Civil No. 183777
(Track IV-Judge Donohue)

CAROL B. MAGEE

Defendant

PLAINTIFF'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT AND IN SUPPORT OF MOTION TO WAIVE NOTICE REQUIREMENT

The Defendant Carol Magee has filed a Motion to Dismiss or in the Alternative for Summary Judgment. The Plaintiff Daryl B. Davis opposes this motion and will now show that it should be denied. In addition, the Plaintiff has filed a Motion to Waive Notice Requirement. This brief also sets forth the reasons why this motion should be granted.

STATEMENT OF FACTS

The Plaintiff initially filed suit against Montgomery County Police Officer Carol B. Magee, Montgomery County, Maryland, and various other local government officials seeking recover damages arising from the March 26, 1997 arrest of Mr. Davis by

Officer Magee and his subsequent imprisonment for a third degree sex offense. Mr. Davis

The Defendant has moved for summary judgment basing its motion entirely on the language of the statute rather than the language of the release. But it is the language of the release that controls and because Mr. Davis has established for summary judgment purposes that records of his arrest, detention, or confinement have not been expunged, material questions of fact exist as to whether the release is void.

Mr. Davis also suspects that the Police Department also failed to comply with the second express condition of the release. Md. Code Ann. art. 27, § 736(c) provides that, upon receipt of notice from a party seeking expungement of police and court records pertaining to criminal charges that were nolle prossed, the law enforcement agency must investigate and attempt to verify if the facts in the notice are correct. Once verified, the statute obligates the police to make a diligent search for all police records, expunge these records, and notify any other law enforcement agency and the Central Repository, it believes may have such records. Mr. Davis suspects that the police have failed to do this but he cannot make a submission on this point until he is able to complete the discovery process.

Finally, Mr. Davis submits that requiring a citizen to release his claims as a condition to having records ora false arrest and charge expunged is unconstitutional. The prior brief filed by the Plaintiff which sets forth the legal basis for this claim is attached for the Court's convenience.(Pl. Ex. ,B).

For the foregoing reasons, the Defendant is not entitled to summary judgment on grounds of the release.

IN THE

COURT OF SPECIAL APPEALS

SEPTEMBER TERM, 1999
NO. 328

DARYL D. DAVIS

Appellant,

VS.

CAROL B. MAGEE,
el al.

Appellee.

Appeal from the Circuit Court for Montgomery County, Maryland

(Hon. D. Warren Donohue Judge)

APPELLANT'S BRIEF

Elbert R. Shore, Esq.
110 S. Washington St.
Rockville, Md. 20850
(301) 762-7979

Counsel for the Appellant

technical sense." Cheney v. Bell National Life, 315 Md. 761,556 A.2d 1135, 1138

(1989)

> The language of the release at issue here provides as follows:
>
> I, Daryl Dwight Davis, hereby release and forever discharge Del. Carol Magee and tile Montgomery County Police Department, all of its officers, agents, and employees and any and all other persons from any and all claims which I may have for wrongful conduct by reason of my arrest, detention, or confinement on or about March 26, 1997.
>
> This General Waiver and Release is conditioned on the expungement of the record of my arrest, detention, or confinement and compliance with Section 736(c) of Article 27 of the Annotated Code of Maryland, and shall be void if these conditions are not met.

(E-172). Mr. Davis submits that the parties clearly and unambiguously expressed their intention in this document. The contract clearly provides without any limitation that the release is conditioned on the "the record of my arrest, detention, or confinement." The plain meaning of this language is that all records maintained by state agencies, must be expunged for the release to be enforceable. Nowhere in the contract is there any language limiting the plain meaning of the phrase "the record of my arrest, detention, or confinement" to records held by only selected state agencies. The contract does not use the word "police" or

"court" to qualify tile word "record." Nor does it even make any mention of Md. Code Ann. art. 27 § 735, the statute which contains the specialized definition of "record." Moreover, Officer Magee offered no parol evidence below indicating that the parties intended for the words used in the release to have any specialized meaning. She offered no evidence concerning the circumstances under which the General Waiver and Release was executed. She offered no evidence that Mr. Davis was advised that the State was obligated to expunge only some of the state records accusing him of being a child sex offender: that DHHS and DSS would continue to list him as an indicated child sex offender; or that police officials would retain investigatory records and make them available to members of the public. Nor did she offer any evidence that Mr. Davis was advised by counsel when he executed the release or that he was even told to review the expungement statute before executing it. Thus there is absolutely no evidence in the record that the parties intended for the words in the release to be given any specialized meaning.

Indeed, even Officer Magee's counsel agreed below that the plain meaning of the language used in the release indicated "records in general" rather than police or court records, although he bizarrely claimed that the language of the contract itself was not important:

> The release is the creation of that statute. It exists so that the expungement can occur. The mere fact that the release does not speak to, quote, "police records or court records," but records in general has no bearing on whether or not the conditions are met.

(E-270). Notwithstanding this effective admission that the language of the contract was unambiguous, Officer Magee's counsel still asked the Circuit Court to construe it in terms of the statute.

Maryland law, of course, does not permit the construction advocated by Officer Magee. When a contract contains unambiguous language, a court is not permitted to engage in construction of the contract but must give it the meaning expressed by the parties:

> The construction of contractual language is, in the first instance, "a question of law for the court to resolve."... A contract is not ambiguous merely because the parties disagree as to its interpretation .... Rather, if the disputed term "is clear as to its meaning, there is no room for construction and it must be presumed that the parties meant what they, expressed."

Lerner v. Three Winthrop, 124 Md. App. 679, 685-86, 723 A.2d 560 (1999)(citations omitted). Because the General Waiver and Release by its express terms is unambiguous, the Circuit Court erred in considering an extrinsic source - the expungement statute -which is not referenced in the document and in engaging in a restrictive construction of the language at issue.

The word "record" can only be accorded the technical meaning advocated by Officer Magee - i.e., that "record" means only "court records" and "police records" - if the release by its terms reflects a mutual intention by the parties to give such a restricted meaning to the word. But the four corners of the release contain no such language indicating that the parties intended to give such a restricted meaning to the word. Hence that state officials who were familiar with the statute may have intended for the phrase to mean police

and court records as used in the statute does not change this result.

Obviously what has really happened with the form General Waiver and Release given to Mr. Davis to sign is that the state officials who drafted this document made an error. They probably intended for the release to track the statute and to provide only for the expungement of the police and court records as defined in the statute. But they utterly failed to express this intention in the language used in the document. They could have expressly referenced "police and court records" in the release but they did not do so. They could have expressly referenced the statutory definition of "'records'" but they did not do so. Instead. they provided Mr. Davis with a release which conditioned the release on the expungement of "the record of my arrest, detention, or confinement." He understood this language to mean what it said and the Circuit Court clearly, erred in rewriting the contract to make it express what the State intended:

> It is a fundamental principle of contract law that it is "improper for the court to rewrite the terms of a contract, or draw a new contract for the parties, when the terms thereof are clear and unambiguous, simply to avoid hardships." .... Contracts play a critical role in allocating the risks and benefits of our economy, and courts generally should not disturb an unambiguous allocation of those risks in order to avoid adverse consequences for one party. In the absence of fraud & duress, mistake, or some countervailing public policy, courts should enforce the terms of unambiguous written contracts without regard to the consequences of that enforcement. Thus, as noted above, the court has no choice but "to

> presume that the parties meant what they expressed," and it may not look to "what the parties thought that the agreement meant or intended it to mean."

Calomiris v. Woods, 353 Md 425,446, 727 A.2d 358 1999)(citations omitted).

Mr. Davis accordingly submits that the release is not ambiguous and that the Circuit Court committed reversible error in looking to the expungement statute to give a restricted meaning to the word "record" as used in the release. This Court accordingly should reverse the summary judgment, rule as a matter of law that the release is void, and remand the case for trial.

B. Assuming arguendo that the General Waiver and Release is ambiguous, the Circuit Court erred in entering Summary judgement for Officer Magee and instead should have submitted the release to the jury for resolution of the ambiguity

Assuming arguendo that the Court disagrees that the General Waiver and Release unambiguously requires the expungemcnt of all records, Mr. Davis submits that the